IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 634

MAE WHEELER, ET AL.

Appellants,

—v.—

JOHN MONTGOMERY, ET AL.

Appellees.

Appeal from the United States District Court
for the Northern District of California

JURISDICTIONAL STATEMENT FILED OCTOBER 11, 1968
PROBABLE JURISDICTION NOTED APRIL 21, 1969

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. 48303

MAE WHEELER v. JOHN MONTGOMERY

DOCKET ENTRIES

DATE 1967		FILINGS—PROCEEDINGS
Nov.	30	1. Filed ord. permitting action to be filed in forma pauperis. Zirpoli
	30	2. Filed complaint. Issued summons.
Dec.	1	3. Filed motion by pltff. for temp. restrain. order, with supporting papers attached.
	1	4. Filed motion by pltff. for prelim. injunc., with supporting affidavits attached.
	1	5. Filed brief by pltff. supporting mos. for a temp. restrain. order and prelim. injunc.
	1	6. Filed appli. by pltff. for convening of 3 Judge Court.
	1	7. Filed memo by deft. Ronald H. Born opposing mo. for a temp. restrain. order and prelim. injunc.
	1	8. Filed declaration of Ronald H. Born on behalf of City and Co. of S.F. opposing mos.
	1	Ord., aft. hrg., Court granted in part the appli. for a temp. restrain. order and prelim. injunc. and restored pltff. to Welfare assistance aid effective Dec. 1, 1967, as will more fully appear in findings and order to be presented by counsel for pltff.; the Court deferred ruling for 30 days without prej. on pltff's. mo. for the convening of a 3 Judge Court. (Zirpoli)
	6	9. 12:34 P.M., Filed temporary restraining order. (Zirpoli)
	7	10. Filed proof of service of summons & complt. on deft. John Montgomery, etc., Nov. 30, 1967.

DATE 1967	FILINGS—PROCEEDINGS
11	11. Filed notice & Motion by Joseph Granatier and Albert Curry, to intervene as pltffs., Dec. 20, 1967, 9:45 A.M., with supporting papers attached.
13	12. Filed notice & Motion by Virginia Hill to intervene as party pltff., Dec. 20, 1967, 9:45 A.M., before Judge Zirpoli, with supporting papers attached.
15	13. Filed notice & Motion by pltff. for modification of temp. restrain. order, Dec. 15, 1967, 9:45 A.M. before Judge Zirpoli, with supporting papers attached.
15	Ord. pltff's. mos. to intervene, for a 3 judge court, for a class action & to modify restraining order taken under submission; motions noticed for hrg. on Dec. 20, & Jan. 2, 1968 ordered off calendar. (Zirpoli)
18	14. Filed motion by Lizzie Reeves for leave to intervene as a party pltff. and for a temp. restrain. order, with supporting affidavit & memo.
18	Lodged temp. restrain. order.
18	Lodged intervenor's complt. (See Sheet "B")
20	15. Filed suppl. affidavit of Lizzie Reeves supporting mo. for temp. restrain. order & mo. to intervene.
20	16. Filed affidavit of J. Gerald Mabey.
20	Ord., aft. hrg., Mo. of Lizzie Reeves to intervene as pltff. and for temp. restrain. order, denied without prej. (Zirpoli)
20	17. Filed Memorandum Opinion and order denying continuance; partially vacating prior order; permitting class action; denying motions to intervene; denying mo. to modify temp. restrain. order; notification & certification of necessity of 3 Judge Court. (Zirpoli) Copies mailed.
20	18. Filed notification and certificate to convene a 3 Judge Court. (Zirpoli) Copies mailed to counsel & Judge Chambers, CCA.
26	19. Filed summons, on return.

DATE 1967		FILINGS—PROCEEDINGS
	26	20. Filed answer of deft. Ronald Born, indiv. and as Genl. Mgr. of San Francisco City & Co. Dept. of Social Services.
	29	21. Filed order convening 3 Judge Court and designating Judges Oliver D. Hamlin, CJ; Albert C. Wollenberg and Alfonso J. Zirpoli, DJ's. (Chambers, CJ)
DATE 1968		
Jan.	4	3 Judge copies made & distributed.
	5	22. Filed notice by pltff. of taking deps. of Frank Vasquez, Norman Clayton, & Wilbur L. Parker.
	5	23. Filed notice by pltff. of taking dep. of Mary Jane Rand and issued subp.
	8	24. Filed dep. subp. d.t., exec. Jan. 8, 1968, as to Mary Jane Rand.
	15	25. Filed notice by pltff. of production of documents pursuant to subp., of a copy of the proposed decision in the Mae Wheeler Fair Hearing, etc. and issued subp.
	17	26. Mailed notice of pre-trial conf. on Feb. 7, 1967, 11:00 A.M. before Judge Zirpoli for sched. a time table for fur. pleadings, etc.; deft. John Montgomery is given to & incl. Jan. 22, 1968 to file his answer or other pleadings. (Zirpoli) Copies sent to Judge Hamlin & Judge Wollenberg.
	19	27. Filed answer of John Montgomery, indiv. & as Director of the Calif. State Dept. of Social Welfare, with exh. attached.
	25	28. Filed notice by pltff. of taking dep. of Dr. Scott Brier, Professor, School of Social Welfare, Berkeley, Calif. & iss. subp.
	29	29. Filed stip. & order cont. pre-trial conf. to Feb. 14, 1967, at 11:00 A.M. (Zirpoli)
	29	30. Filed dep. subp. d.t., exec. Jan. 29, 1968, as to Scott Brier.
Feb.	6	31. Filed deposition of Frank J. Vasquez.
	6	32. Filed deposition of Wilbur L. Parker.
	6	33. Filed deposition of Norman Clayton.

DATE 1968		FILINGS—PROCEEDINGS
	14	Ord., aft. pre-trial conf., a joint pre-trial order to be presented. (Zirpoli)
	14	34. Filed additional statistical material in regard to the deposition of Wilbur L. Parker. (In brown envelope)
	14	35. Filed deposition of Mary Jane Rand, with statistical material in brown envelope attached.
	23	36. Filed additional statistical material, as to the deposition of Frank J. Vasquez. (In brown envelope in file)
Mar.	14	37. Filed notice of trial before 3 Judge Court, Apr. 12, 1968, 10 A.M. in Courtroom No. 2; pltff's. brief to be filed by Mar. 15, 1968; resps' brief filed by Apr. 1, 1968 (Clerk)
	19	38. Filed brief in support of motion for preliminary injunction, etc.
	20	39. Filed pre-trial order case will probably be set during week of April 8, 1968. (Zirpoli)
Apr.	1	40. Filed defts' reply trial brief.
	9	41. Filed pltffs' reply brief.
	9	42. Filed pltffs' Exhibit Number 1.
	11	43. Filed list of documents described in pre-trial order, dated March 19, 1968, marked for identification and to be offered as pltffs' exhibits in evidence.
	11	44. Lodged order form. (Preliminary injunction)
	12	Trial before 3 Judge Court, ordered case submitted. (Hamlin, Wollenberg, Zirpoli)
	19	45. Filed memorandum opinion and order that this proceeding may, with propriety, now be dismissed. (Hamlin, CJ, Wollenberg, Zirpoli)
June	14	46. Filed notice of appeal by pltff. to the Supreme Court of the United States.
	17	Mailed notice of filing notice of appeal.
July	15	Made, Mailed Record on Appeal Supreme Court of the U.S.

In the United States District Court for the Northern District of California

No. 48303

Filed November 30, 1967, Clerk U. S. District Court, San Francisco

[TITLE OMITTED IN PRINTING]

COMPLAINT FOR THREE JUDGE COURT, DECLARATORY JUDGMENT, AND INJUNCTIVE RELIEF

I

This is an action for injunctive and declaratory relief authorized by Title 42 U.S.C. 1983 to secure rights, privileges and immunities established by the Fourteenth Amendment to the Constitution of the United States and the Social Security Act, 42 U.S.C. 301, *et seq.*, and the regulations promulgated thereunder.

II

Jurisdiction is conferred on this Court by 28 U.S.C. 1343(3) and (4) providing for original jurisdiction of this Court in suits authorized by 42 U.S.C. 1983; and jurisdiction is further conferred on this court by 28 U.S.C. 2201 and 2202 relating to declaratory judgments.

III

This is a proper case for determination by a three judge Court pursuant to Title 28 U.S.C. 2281 and 2284, in that it seeks an injunction to restrain the defendants from applying, enforcing, executing and implementing Sections

12200, 12201 and 10950 of the California Welfare and Institutions Code (annexed hereto as Exhibit A) and the regulations promulgated thereunder, insofar as these statutes and regulations require termination, suspension or reduction of financial aid in the form of Old Age Security (OAS) prior to granting of notice and opportunity to be heard, on the grounds of the invalidity of said statutes and regulations under the Constitution and laws of the United States.

IV

This action seeks an injunction and declaratory judgment restraining the enforcement of and declaring unconstitutional the aforesaid state statutes and state-wide regulations, on their face and as applied and interpreted by defendants, on the grounds that said statutes and regulations, and actions taken pursuant thereto, deny to plaintiffs the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and the "fair hearing" guaranteed by the Social Security Act, in that said statutes and regulations deny to plaintiffs an opportunity for a hearing prior to termination and withdrawal of financial aid under the OAS program.

V

Plaintiff Mae Wheeler is an adult citizen of the United States and a resident of the City and County of San Francisco, State of California.

VI

Plaintiff Wheeler brings this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of herself and all other recipients who are similarly situated. All OAS recipients are similarly affected by the statutes and regulations challenged herein in that all said recipients

are by statute and regulation made subject to peremptory *ex parte* termination of their aid. The persons in the class are so numerous as to make joinder impractical; there are common questions of law and fact; plaintiff's claims are typical of the claims of the class; and the representative party will fairly and adequately protect the interests of the class.

VII

Defendant John Montgomery is the Director of the California Department of Social Welfare and is charged with statewide administration of the OAS program and with establishing rules and regulations to carry out the statutory provisions of said program.

Defendant Ronald Born is General Manager of the San Francisco City and County Department of Social Services and is responsible for administration of the OAS program in the City and County of San Francisco, State of California.

VIII

The OAS program created by Section 12000, *et seq.* of the California Welfare and Institutions Code, provides financial aid to persons over sixty-five years of age. Persons who meet the statutory criteria receive financial aid as a matter of statutory entitlement.

IX

At all times relevant hereto the State of California and defendants, in order to receive federal funds for the OAS program of the State of California, have been required by the Social Security Act, 42 U.S.C. § 301, *et seq.*, to have formulated a "state plan" for said program in conformity with the provisions of the Act and the United States Constitution. The Social Security Act, 42 U.S.C. § 302(a)(4)

as interpreted by regulations of the United States Department of Health, Education and Welfare require that a "state plan" provide for granting an opportunity for a fair hearing before the State agency to any individual aggrieved by an action of a County Department of Social Welfare.

X

Plaintiff Mae Wheeler is a seventy-five year old widow who had been receiving OAS continuously for thirteen years until her aid was terminated.

XI

Defendants have established plaintiff's total monthly needs at $158.55. This figure includes plaintiff's regular allotment for food, rent, clothing, transportation, and other necessities, plus added allowances for required telephone service ($2.70), laundry ($3.00), household remedies ($4.00) and a special medical diet ($11.35). Until September 1, 1967, defendants had granted plaintiff $113.95 monthly; the remainder of plaintiff's needs being met by monthly OASDI (Social Security) payments of $44.60. In addition, by virtue of her OAS eligibility, plaintiff was entitled to complete free medical treatment and hospitalization under the Medi-Cal program.

XII

Without prior notice defendants withheld plaintiff's September 1, 1967 OAS check.

XIII

On or about September 14, 1967, defendants informed plaintiff that her OAS was being withheld because of plaintiff's alleged transfer of approximately $4,000.00 in insurance proceeds to her deceased son's nephew in satisfaction of a pre-existing debt owed by her deceased son to said nephew.

XIV

In September and October, 1967, plaintiff, assisted by a social worker from the Public Health Authority, attempted to have her OAS restored.

XV

By letter dated November 7, 1967, plaintiff was informed that her OAS was discontinued effective August 31, 1967. The basis of the discontinuance was ineligibility due to transfer of personal property with the intent to reduce plaintiff's holdings to a sum within the maximum amount permitted to be retained by an OAS recipient. It was not and is not alleged that plaintiff had or has retained any money for her own use or benefit as a result of her son's death.

XVI

On November 16, 1967, after seeking advice, plaintiff, through her authorized representative, filed an appeal and request for a hearing and a further request that her aid be restored and continued until a decision after hearing. (A copy of plaintiff's representative's letter requesting restoration of aid is attached hereto as Exhibit B.) No answer to said letter has been received to date; aid has not been restored, nor has a hearing been scheduled.

XVII

At present, plaintiff has no assets to pay her December rent. Her total income (met through Social Security and the County General Assistance program) is projected at $98.50 per month, although defendants have calculated plaintiff's minimum needs to be $158.55 monthly. To date, plaintiff has only received a $15.60 emergency food order under the General Assistance program.

XVIII

Plaintiff is in extremely poor health and was hospitalized on or about November 26, 1967. No money for plaintiff's medical expenses or special medical needs is now being granted.

XIX

Section 10950 of the California Welfare and Institutions Code, prescribing the hearing procedure in the OAS program, and Sections 12200 and 12201 prescribing the manner of termination or reduction of aid in the OAS program on their face and as interpreted and applied to plaintiff and members of her class, violate the rights of due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and the "fair hearing" guaranteed by the Social Security Act in that said statutes and the regulations adopted in enforcement thereof authorize and require effective action terminating, suspending and revoking financial aid prior to the granting of reasonable notice and opportunity for a hearing. The termination and withdrawal of financial aid may, under the regulations, extend for a period of several months before a hearing is held and a decision is rendered, even though plaintiff had been receiving such aid and is in vital need of such aid for food and shelter and medical care and even though plaintiff is prepared to prove that she is and has been eligible.

XX

Plaintiff has no adequate remedy at law and defendants will continue to cause plaintiffs irreparable injury unless enjoined by this Court.

Wherefore, plaintiff respectfully prays on behalf of herself and others similarly situated, that this Court:

1. Assume jurisdiction of this cause and convene a three judge Court pursuant to Title 28 U.S.C. § 2281.

2. Enter a temporary restraining order and a preliminary injunction ordering the defendants to grant plaintiff's request for restoration and continuation of aid until the holding of a hearing and the issuance and implementation of a decision by the State Department of Social Welfare, or until the determination of this cause.

3. Enter a declaratory Judgment pursuant to Title 28 U.S.C. 2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure declaring that Sections 10950, 12200 and 12201 of the California Welfare and Institutions Code and the regulations issued pursuant thereto violate the Fourteenth Amendment to the United States Constitution and the Social Security Act on their face and as applied, insofar as they authorize and require termination, suspension or revocation of aid prior to granting reasonable notice and opportunity for a hearing.

4. Enter a preliminary and permanent injunction restraining the defendants, their successors in office, agents and employees from terminating, suspending or revoking the aid of any OAS recipient prior to the granting of reasonable and adequate notice and opportunity for a hearing which satisfies the standards of due process of law.

5. Allow plaintiff her costs herein, grant her and all others similarly situated such additional or alternative relief as the Court may deem to be just and appropriate.

Respectfully submitted,

PETER E. SITKIN
STAFFORD SMITH
ISIDOOR BORNSTEIN
GILBERT GRAHAM
1095 Market Street, Suite 312
San Francisco, California 94103
Telephone: (415) 626-3811
Attorneys for Plaintiffs

STEVEN ANTLER
2701 Folsom Street
San Francisco, California 94110

BRIAN GLICK
HENRY FREEDMAN
401 West 117th Street
New York, New York 10027
Of Counsel

EXHIBIT A (to complaint)

STATUTES

CALIFORNIA WELFARE AND INSTITUTIONS CODE:

Section 12200. *Grounds; report of suspension; effect of eligibility for medical assistance.* The county may for cause, and upon instructions so to do by the department, shall cancel, suspend, or revoke aid. Upon request of the department, an immediate report of every suspension shall be made to the department stating the reason for the suspension and showing the action of the board of supervisors in approving the suspension.

Eligibility for medical assistance for the aged does not constitute cause for retroactive cancellation, suspension, or revocation of aid.

Section 12201. *Notice to recipient.* If the board of supervisors, in accordance with Section 12200, cancels, suspends, or revokes aid, the recipient shall be immediately notified in writing of the county's action, the date thereof, and of the reason therefor and the recipient's right to appeal therefrom.

Section 10950. *Opportunity; recipient defined.* If any applicant for or recipient of public social services is dissatisfied with any action of the county department relating to his application for or receipt of aid or services, or if his application is not acted upon with reasonable promptness, or if any person who desires to apply for such aid or services is refused the opportunity to submit a signed application therefor, and is dissatisfied with such refusal, he shall, in person or through an authorized representative, without the necessity of filing a claim with the board of supervisors, upon filing a request with the department, be accorded an opportunity for a fair hearing.

As used in this chapter, "recipient" means an applicant for or recipient of aid or services except aid or services exclusively financed by county funds.

EXHIBIT B (to complaint)

November 16, 1967

State Department of Social Welfare
Fair Hearing Section
1407 Market Street
San Francisco, California 94103

Re: Mrs. Mae Wheeler
1855 15th Street
San Francisco, California
OAS #38-10-56380

Gentlemen:

Mrs. Wheeler has authorized me to represent her in her request for a Fair Hearing and in other proceedings necessary to have her Old Age Security payments immediately re-instated.

Since September 1, 1967, Mrs. Wheeler has not received any old age assistance because the local Social Services Department ruled that she transferred some of her deceased son's property in order to qualify for aid. This decision is contrary to the facts and a misapplication of the law and regulations—I request an immediate fair hearing.

As you should be aware, Mrs. Wheeler is 75 years old, and in extremely poor health. Her regular assistance budget includes money for a special diet as well as other vital additional items. At the present time, my client must live on Social Security payments of $44.00 monthly. She has no other income or assets. I hereby request that your department grant Mrs. Wheeler continued full assistance pending the decision of the fair hearing—she cannot survive without this money.

By letter dated November 7, 1967, Mrs. Wheeler was informed that her grant was discontinued effective August 31, 1967, because of "ineligibility due to transfer of personal property." On November 1, 1967, she had been informed by letter that "Your September and October, 1967, warrants which were withheld, will be decreased to zero because of lump sum death benefits received by beneficiary which resulted in overpayments in August and September." Mrs. Wheeler had first discovered that her eligibility was questioned when she inquired why she had not received her regular September 1st check.

The San Francisco Department challenges Mrs. Wheeler's payment to her grandson, Bobby Lee Wheeler of the proceeds of a Veterans Insurance Policy left by her son, R. L. Wheeler who died February 5, 1967. There is no question that the policy was actually paid to Bobby Lee Wheeler, and that Mrs. Wheeler no longer has any money remaining.

The Department relies on Section 41-321.321, PSS Manual [Applicant or Recipient Unable to Account for Disposition of Property], as the basis of its action. Assistance was discontinued in spite of Mrs. Wheeler's explanation that her son while in the hospital following his heart attack made her promise to pay the policy over to his nephew. Mrs. Wheeler has supplied the Department with two affidavits from her grandson explaining in detail the circumstances of the original loan and the arrangements for its repayment as well as her own four page affidavit on this subject.

Section 41-321.1 PSS Manual states:

> Although only the person concerned can state what his intent was in transferring property, his actions can support or contradict such statement and *his real intent can be determined only by consideration of all the facts.* (emphasis added)

Here all the facts clearly substantiate Mrs. Wheeler's claim and rebute any possible presumption that she was attempting to illegally remain eligible for assistance.

Additionally, the Department's reduction to zero of Mrs. Wheeler's September and October grant is violative of the law. Appellant also reserves her rights to present all relevant testimony and argument challenging every aspect of the local department's action of suspending, reducing and discontinuing her grant.

Mrs. Wheeler stated in her October 18th letter (accompanying the material she submitted to her social worker), "my situation has become desperate as I do not have enough money to live on without my OAS grant." As Mrs. Wheeler has a constitutional right to a hearing prior to discontinuing of her old age assistance, immediate resumption of assistance prior to the hearing is required.

If I do not hear from you within one week, I will be forced to resort to court action.

Sincerely,

MARVIN S. KAYNE
Attorney at Law

By .....
STEVEN J. ANTLER

SJA/aee
CC: Commissioner John Montgomery

AUTHORIZATION

I hereby authorize as my representatives in connection with this welfare appeal: Marvin S. Kayne, Esq., Peter E. Sitkin, Esq., and Mr. Steven J. Antler, 2701 Folsom Street, San Francisco, California.

Dated: November 16, 1967.

/s/ MRS. MAE WHEELER

.....
Mrs. Zulma Mae Wheeler

In the United States District Court for the Northern District of California

[TITLE OMITTED IN PRINTING]

AFFIDAVIT IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

State of California
City and County of San Francisco—ss.

Mrs. Mae Wheeler, having been duly sworn, deposes and says:

1. I am the plaintiff in the above-entitled action.

2. I am a 75 year old widow who regularly resides at 1855 - 15th Street, City and County of San Francisco, a Public Housing Project for the elderly.

3. For approximately the last ten years my sole source of support has been Old Age Security (OAS) and Social Security (OASDI) payments.

4. My last OAS check came on about August 1, 1967, and I haven't received any money under the OAS program since that date.

5. The reasons given for terminating my OAS are completely untrue. I transferred my deceased son's insurance policy to his nephew to satisfy my son's debt. I never intended to affect my OAS eligibility. Through my representative, I requested continued OAS assistance until I could vindicate myself at a fair hearing.

6. I was living on my allowable reserve income and my Social Security payments ($44.60 monthly) until about November 10, 1967, when I ran completely out of funds.

7. On or about November 25, 1967, I finally received an emergency food order for $15.60 and have been promised $43.90 monthly from the County General Assistance Program.

8. I have no money whatsoever on hand now. I can't pay my December rent of $49 or buy any household or other items I need.

9. I am a diabetic who needs a special diet of foods such as meats and sugar free fruits, which are much more expensive than regular foods. I have difficulty buying these items on my full OAS budget.

10. I also suffer from heart disease and high blood pressure. I am currently confined to Hahnemann Hospital on doctor's orders as a result of my many ailments, but I expect to be released from the hospital within the next few days.

11. I am extremely worried and nervous because I don't know how I can possibly live without my full OAS grant.

/s/ MRS. MAE WHEELER

.....

Mrs. Mae Wheeler, Affiant

In the United States District Court for the Northern District of California

[TITLE OMITTED IN PRINTING]

SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

State of California
City and County of San Francisco—ss.

ARTHUR C. AGNOS, being duly sworn, deposes and says:

I received a Master of Social Work Degree (MSW) in April, 1966. I have been Assistant Director of Human Relations and Social Services with the San Francisco Public Housing Authority since September, 1966.

Mrs. Mae Wheeler was referred to my office by one of the Housing Authority's Review Clerks. When she saw the Review Clerk, she expressed concern about not receiving her OAS check.

Mrs. Wheeler called my office on September 14, 1967, claiming that she had not received her OAS check and her situation was becoming more and more desperate. She seemed extremely anxious and was crying. I reassured her that I would help her and would call the Department of Social Services.

On the same day, September 14, I called Mrs. Wheeler's welfare worker, Mrs. Geraldine Palmer, and asked for clarification of the situation. She explained that Mrs. Wheeler's check had been suspended until an investigation could be made. She told me that, since I was not Mrs. Wheeler's representative, she could not discuss the case with me. How-

ever, she did tell me that the Department had received an anonymous phone call telling them that Mrs. Wheeler had received an inheritance and should not be receiving welfare assistance. I asked why Mrs. Wheeler had not been told this and she explained that she had been away on vacation and had just returned to a pile of work. I stressed the fact that Mrs. Wheeler was an emergency situation and merited immediate attention. I strongly questioned the fact that the OAS check had been cut off on the basis of an anonymous phone call without any discussion with Mrs. Wheeler. I demanded immediate action to correct the situation. The welfare worker said that she would see what she could do.

Shortly after my telephone conversation with the welfare worker, I received a call from her supervisor, Mrs. Ream, who questioned my involvement in the case. I explained that part of my job as a social worker with the Housing Authority often necessitated helping Housing Authority residents with welfare problems. More specifically, Mrs. Wheeler had requested that I act in her behalf as she was at a loss as to what to do.

The supervisor refused to discuss the case with me stating that the problem was between the Department and the Recipient and the Department would take it up "in our good time." I refused to accept the statement that the Department would take the situation up "in our good time" as I was acutely aware of Mrs. Wheeler's increasingly desperate condition. I again strongly disagreed with the way in which Mrs. Wheeler had been treated on the basis of an anonymous phone call. I insisted that something be done immediately to correct the situation. The supervisor explained that the assigned worker had been on vacation and could not see Mrs. Wheeler. I questioned delaying action on a matter which involved the major part of a 75 year old ill woman's income, and that I was not satisfied with the situation.

I immediately called Miss Trudy Kanner, Supervisor of the Community Services Division, explained the situation and requested an immediate opportunity to do something to get Mrs. Wheeler's aid restored. She agreed to look into the matter immediately. Shortly thereafter Miss Kanner called back to tell me that we would have the opportunity on Monday, September 18.

I arranged for Mrs. Wheeler to sign a "release of information" in order that the Department would discuss the case with me. On Friday, September 15, I was present during a home visit by the welfare worker who told us what statements were needed. Over the weekend I helped Mrs. Wheeler gather and prepare the required information.

On Monday, September 18, I appeared with Mrs. Wheeler and a relative at the Department of Social Services. We were met by Mrs. Wheeler's welfare worker and a man who was introduced as a representative from the County Fair Hearings Section. I presented the prepared statements to the welfare worker who briefly scanned them. Mrs. Wheeler stated that she had not intended to deceive the Department, but was only carrying out her late son's dying wish. Mrs. Wheeler asked when her aid would be restored. The welfare worker replied that at this meeting she could only receive the prepared statements from us. In turn, she would forward them to administrative superiors for a decision. Mrs. Wheeler asked how long it would take for a decision. The representative from Fair Hearing Section stated that she would be notified about the decision. I asked the representative what his role was in today's meeting. He answered that he was only present as an "observer." This entire meeting lasted approximately ten minutes and absolutely no decision was rendered. It was only to present the prepared statements to the welfare worker.

On September 22, I called the welfare worker to learn of any decision. She informed me of additional information which was required to amplify on the earlier statements. A letter was received outlining the additional information required. I immediately set about compiling the considerable amount of additional information. This involved writing to Texas for a statement from another ill son, supplemental statements from a nephew, driving to Milpitas with Mrs. Wheeler to try to determine the disposition of a home purchased by her deceased son in 1962.

On October 16, 1967, Mrs. Wheeler presented the additional information required to the welfare worker.

On October 19, 1967, the welfare worker telephoned Mrs. Wheeler and me to inform us that her OAS grant had been restored. She told me that there had been a transfer of funds but it was not considered intentional, and the aid was to be restored.

On October 23, 1967, another phone call from the welfare worker informed Mrs. Wheeler and me that the aid was not to be restored. The decision had been reversed by administrative higher ups. She suggested that Mrs. Wheeler could request a fair hearing.

At this point I felt I had exhausted all of my professional resources. I recommended to Mrs. Wheeler that we apply for legal assistance from the San Francisco Neighborhood Legal Assistance Foundation.

/s/ ARTHUR C. AGNOS

Arthur C. Agnos

TEMPORARY RESTRAINING ORDER

In the United States District Court
for the Northern District of California, Southern Division

Civil Action No. 48303

MAE WHEELER, et al.,
Plaintiffs,

v.

JOHN MONTGOMERY, et al.,
Defendants,

TEMPORARY RESTRAINING ORDER

The plaintiffs have filed this action to declare unconstitutional California Welfare & Institutions Code Sections 12,200, 12,201 and 10,950, which authorizes the termination, suspension or revocation of financial aid under the Old Age (OAS) program prior to the granting of reasonable and adequate notice and opportunity for a hearing. They have made application for the hearing of this cause for a declaratory judgment, preliminary and permanent injunction before a Three-Judge District Court pursuant to Title 28, United States Code, Sections 2281 and 2284.

This action coming on to be heard on December 1, 1967, on the motion of plaintiffs for a temporary restraining order, and adequate notice having been given to defendants; and the Court having considered the affidavits and memoranda presented and the arguments of counsel for all parties, and being fully advised in the premises, it makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Defendants withheld and thereafter terminated plaintiff Mae Wheeler's aid under the OAS program without affording her reasonable notice and an opportunity for a prior hearing.

2. Plaintiff Mae Wheeler's minimum monthly need as of August 31, 1967 was determined by defendants to be $158.55 and was met through direct Social Security benefits of $44.60 and an Old Age Security grant of $113.95. As a consequence of the termination of Old Age Security, she now has been promised County General Assistance in the sum of $53.90 a month which, when added to her direct Social Security payments totals $98.50 a month.

3. Defendants have refused plaintiff Mae Wheeler's request for restoration and continuation of aid under the OAS program.

4. Defendants' withdrawal and termination of aid and their continued refusal to reinstate plaintiff Mae Wheeler's aid has caused and is causing plaintiff Mae Wheeler immediate and irreparable injury in that she will not have sufficient funds with which to subsist on a day-to-day basis without her full OAS payment.

5. Irreparable injury has been shown only with respect to plaintiff Mae Wheeler and no proof so far has been presented of any others in the class who are likely to suffer immediate and irreparable injury.

CONCLUSIONS OF LAW

Defendants' termination of plaintiff Mae Wheeler's aid under the OAS program pursuant to California Welfare & Institutions Code Sections 12,200 and 12,201 and the regulations promulgated thereunder without a prior hearing

and reasonable notice raises a substantial question as to whether the due process clause of the Fourteenth Amendment to the U.S. Constitution has been violated.

Upon the foregoing, it is, by the United States District Court for the Northern District of California, Southern Division, this 1st day of December, 1967

ORDERED:

1. That the defendants John Montgomery and Ronald Born, their agents, servants, and employees be, and they are hereby restrained effective December 1, 1967 from enforcing against the plaintiff Mae Wheeler the provisions of the California Welfare and Institutions Code Sections 12,200, 12,201, and 10,950, et seq., and implementing the Rules and Regulations of the State Department of Social Welfare, so that Old Age Assistance shall be restored to plaintiff Mae Wheeler forthwith in the amount to which she may be found eligible in order to meet her needs as established under the Old Age Security program until such time as a determination is made by this Court regarding plaintiff's application for convening a Three-Judge Court pursuant to Title 28 U.S.C. 2281 and 2284.

2. That action on plaintiff's application for the convening of a Three-Judge Court shall be deferred for 30 days until January 2, 1968, at 5 p.m. without prejudice to any of the parties herein.

ALFONSO J. ZIRPOLI
District Court Judge

Signed on December 6, 1967.

APPROVED AS TO FORM:
THOMAS C. LYNCH
Attorney General

By ELIZABETH PALMER
Deputy Attorney General

Attorneys for Defendant
JOHN MONTGOMERY

THOMAS M. O'CONNOR,
City Attorney

By.....
Raymond D. Williamson, Jr.
Deputy City Attorney

Attorneys for Defendant Ronald Born

MEMORANDUM OPINION PERMITTING CLASS ACTION AND CERTIFYING NECESSITY OF CONVENING THREE-JUDGE DISTRICT COURT.

United States District Court
For the Northern District of California
No. 48303

Mae Wheeler, individually and on behalf of all others similarily situated,
Plaintiffs,

vs.

John Montgomery, individually and in his capacity as Director of the California State Department of Public Welfare, and Ronald Born, individually and in his capacity as General Manager of the San Francisco City and County Department of Social Services,
Defendants.

MEMORANDUM OPINION AND ORDER DENYING CONTINUANCE, ORDER PARTIALLY VACATING PRIOR ORDER, ORDER PERMITTING CLASS ACTION, ORDER DENYING MOTIONS TO INTERVENE, ORDER DENYING MOTION TO MODIFY TEMPORARY RESTRAINING ORDER, NOTIFICATION AND CERTIFICATION OF NECESSITY OF THREE JUDGE COURT.

FACTS AND PROCEEDINGS TO DATE

Plaintiff has filed a complaint, in forma pauperis, seeking injunctive and declaratory relief against a California welfare practice authorized by state statutes which permit the termination of old age security benefits prior to affording the recipient a hearing on his supposed ineligibility. The

statutes which are involved are CAL. WELF. & INST. CODE §§ 12,200, 12,201. The complaint is in the form of a class action.

The facts alleged pertaining to the named plaintiff are as follows: As of August 30, 1967, Mrs. Wheeler was receiving old age benefits in the amount of $113.95. Defendants received information that Mrs. Wheeler had received some $6,000.00 in insurance proceeds and had transferred the money to her grandson. Defendants determined that Mrs. Wheeler's alleged action rendered her ineligible for continued benefits because she had had more money than the maximum permitted while maintaining eligibility.

Mrs. Wheeler's benefit checks had, at the time the suit was filed, been withheld since September 1, 1967, although she came to receive general assistance in the amount of $53.90 until December 1, 1967, the date on which this court heard argument on the propriety of a temporary restraining order restoring old age benefits and on the need for a three judge court.

On December 6, 1967, this court issued a temporary restraining order to avoid irreparable injury to Mrs. Wheeler, the court having been satisfied by plaintiff's showing that such injury was occurring. The court also stayed further proceedings for thirty days to permit Mrs. Wheeler to appeal to a state referee to adjudicate her dispute with the County of San Francisco.

Prior orders in no way were a determination of the merits of plaintiff's claims, but merely endeavored to preserve the status quo pending the court's determination of the questions involving a three judge court and a class action. The court recognizes that the result of the appeal will in no way affect the existence of a case or controversy between the parties over the constitutionality of the statutes

here challenged. No restraining order was issued applicable to any other member of the alleged class because no showing was made of an imminent threat of irreparable harm. The court expressly allowed appropriate showing to be made as instances of threatened irreparable harm arose.

Since December 6, 1967, plaintiff's counsel have made motions for intervention and a motion for modification of the temporary restraining order to include the entire alleged class. The court deems the showings made with respect to persons other than Mrs. Wheeler inadequate to warrant further injunctive relief at this time.

Defendants' counsel have requested a continuance of the argument scheduled on some of the motions and on the questions of the three judge court and class action. Having heard further argument on December 15, 1967, the court deems that no continuance is necessary, that the pleadings constitute a more-than-adequate record on which to base rulings on the matters now pending before the court, and that the court's duty is to determine certain of the questions involved by referring to the complaint in this action. The court is satisfied that any previous stay of these proceedings to permit further argument has been rendered unnecessary by the court's own examination of the issues involved in this case and by further argument and documents filed by the parties.

JURISDICTION: NEED FOR A THREE JUDGE COURT

Plaintiff's basic contention is that to terminate old age benefits without first giving the recipient a hearing is to deny a recipient due process of law. Plaintiff contends that the right to a hearing prior to termination may be found either in the due process clause, U.S. Const., amend. 14,

or in portions of the Social Security Act, specifically 42 U.S.C. § 1382(a)(4) and certain regulations promulgated pursuant thereto. Plaintiff's attack is merely on the procedural method by which aid is terminated. She disclaims any contention that under the facts as alleged by defendants to exist, aid may not be terminated. She merely says that a hearing on the question of eligibility must be held prior to the termination.

Actually, three potential constitutional challenges lurk in the pleadings of this case: (1) California's termination statutes are repugnant to the due process clause of the fourteenth amendment; (2) California's termination statutes are repugnant to provisions of the Social Security Act; (3) if California's termination statutes are not repugnant to the Act, the Act is repugnant to the due process clause of the fifth amendment. While the second enumerated contention does not require a three judge court, *Swift & Co., Inc. v. Wickham,* 382 U.S. 111 (1965), the first and third do, 28 U.S.C. §§ 2281, 2282.

The requirements of § 2281 are satisfied in this case: a state statute is challenged as repugnant on its face to the federal constitution; an injunction is sought; a state officer is a defendant; the statute has statewide application.

This court cannot say the federal question presented is not substantial in the sense that term is used with reference to the propriety of a three judge court. Just "how much due process" is required is a difficult question to decide when administrative proceedings are involved. Also, the precise question presented—whether a hearing prior to administrative action is required—is a difficult question which has engendered considerable debate and litigation. Though not resolved, a situation strikingly similar to the one in this case has been presented to and reached the Supreme Court. *Thorpe v. Housing Authority of the City of Durham,* 386 U.S. 670 (1967).

Recent years have seen an increasing number of decisions dealing with the question of public entities attempting to terminate "benefits" without hearings. *E.g., Slochower v. Board of Higher Education of New York City,* 350 U.S. 551 (1956); *Wasson v. Trowbridge,* 382 F. 2d 807 (2d Cir. 1967); *Dixon v. Alabama State Board of Education,* 294 F. 2d 150 (5th Cir. 1961), *cert. denied,* 368 U.S. 930 (1961); *Teel v. Pitt County Board of Education,* 272 F. Supp. 703 (E.D. N.C. 1967). *But cf., e.g., Cafeteria & Restaurant Workers Union v. McElroy,* 367 U.S. 886 (1961); *Vitarelli v. Seaton,* 359 U.S. 535 (1959). See also 1 Davis, Administrative Law §§ 7.04-7.20; Silver, *How to Handle a Welfare Case,* 4 Law in Trans. Q. 87, 100 n. 54 and accompanying text (1967); Note, *Federal Judicial Review of State Welfare Practices,* 67 Colum. L. Rev. 84, 93 (1967). Based on a review of the above and other authorities, this court must conclude that the precise federal question presented by this case is substantial and that a three judge court is required to ultimately dispose of the issues.

CONSIDERATIONS PERTAINING TO A CLASS ACTION

The prayer for declaratory and injunctive relief raises common issues of law for each member of the class; namely, whether a termination of benefits without a prior hearing denies a recipient his rights under the United States Constitution. All members of the class are governed by the same California procedures and statutes.

The court concludes that the prerequisites of Fed. R. Civ. P. 23(a) are satisfied. Similarly, the requirement of Fed. R. Civ. P. 23(b)(2) is satisfied.

The foregoing memorandum opinion and the orders which follow dispose of the matters presently scheduled

to be heard on January 2, 1968, and of all other preliminary matters now pending before this court. Hence, absent further pleadings by the parties, no further action or appearances will be required of the parties prior to the convening of the three judge court.

ORDERS

1. The court being satisfied that a continuance would serve no useful purpose in disposing of the merits of this case, It Is Ordered that defendants' motion for a continuance is denied.

2. The court being satisfied that further delay in the resolution of pending matters would not aid the court in ruling on such matters, and the court having examined the pleadings and authorities relevant to the rulings made this day, It Is Ordered that any prior order of this court is vacated to the extent such order stayed further proceedings preliminary to the court's ruling on any matter ruled upon this day.

3. Pursuant to Fed. R. Civ. P. 23(a), (b)(2), (c)(1), and (d)(2), It Is Ordered that a class action for declaratory and injunctive relief may be maintained, the class to consist of all recipients of old age benefits subject to California termination statutes, and that plaintiff shall forward to the United States Attorney at San Francisco and to the Secretary of the Department of Health, Education and Welfare, notice of the pendency of this action, together with a copy of the pleadings heretofore filed with the court and with a copy of this memorandum opinion and these orders.

4. The court being satisfied that the showings heretofore made on behalf of the putative intervenors are not substantial enough to require intervention, and the court

being satisfied that the rights of all members of the class will be protected without the intervention, It Is Ordered that all motions to intervene on file on the date of this order are denied.

5. The court being satisfied that the showings heretofore made in support of the motion to modify the temporary restraining order are insufficient to justify further injunctive relief at this time by this court, It Is Ordered that the motion to modify the temporary restraining order is denied without prejudice to such reconsideration as may be appropriate of requests for interim relief.

6. The court will notify the chief judge of the ninth circuit that in this court's opinion a three judge court is required to resolve the issues in this case.

Dated: December 20, 1967

ALFONSO J. ZIRPOLI

United States District Judge

Filed Feb. 20, 1967

In the United States District Court
for the Northern District of California

[TITLE OMITTED IN PRINTING]

ANSWER TO COMPLAINT

Comes now the defendant RONALD BORN, individually and in his capacity as General Manager of the San Francisco City and County Department of Social Services, and answering the complaint of plaintiffs on file herein, admits, denies and alleges as follows:

I

Denies each and every, all and singular, generally and specifically, the allegations contained in paragraphs I, II, III, IV, VI, X, XI, XII, XIII, XV, XVI, XVII, XVIII, XIX and XX of said complaint.

II

Answering the allegations of paragraph XIV of said complaint this answering defendant states that he has no information or belief upon the subject sufficient to enable him to answer any of the said allegations, and placing his denial on that ground, this defendant denies each and every, all and singular, generally and specifically, said allegations.

III

Answering the allegations of paragraph VII of said complaint, Ronald Born states that he is the Director of the Department of Social Services for the City and County of San Francisco.

IV

Answering the allegations of paragraph IX of said complaint, this defendant admits that, in accord with due process, a "fair hearing" is afforded any recipient who feels

aggrieved by a decision to terminate aid, and Mae Wheeler received such fair hearing on December 22, 1967.

V

Further answering the allegations of paragraph X of said complaint, this defendant states that plaintiff has been a recipient of old age security for a period of about ten (10) years.

VI

Further answering the allegations of paragraph XII of said complaint, this defendant states, on information and belief, that plaintiff was contacted by telephone on August 30, 1967, and, in that telephone conversation, admitted receiving and subsequently transferring funds received due to the death of her son; that plaintiff had not notified the Department of Social Services of the existence or disposition of these funds; and that no check was withheld until after plaintiff had admitted receiving and disposing of funds received due to the death of her son.

VII

Further answering the allegations of paragraph XVI of said complaint, this defendant states that a fair hearing was conducted on December 22, 1967, and plaintiff has been mailed her December check for Old Age Security.

Wherefore, defendant prays that plaintiffs take nothing by their complaint on file herein, that said defendant have judgment for his costs of suit herein incurred and for such other and further relief as to the court may seem proper.

Dated: December 26, 1967.

THOMAS M. O'CONNOR
City Attorney

RAYMOND D. WILLIAMSON, JR.
Deputy City Attorney

In the United States District Court
for the Northern District of California

[TITLE OMITTED IN PRINTING]

Civil Action No. 48303

ANSWER TO COMPLAINT

Comes now the defendant John Montgomery, individually and in his capacity as Director of the California State Department of Social Welfare and answering the complaint of plaintiffs on file herein, admits, denies and alleges as follows:

I

Denies each and every, all and singular, generally and specifically the allegations contained in paragraphs I, II, III, IV, VI, XI, XVII, XVIII and XX of said complaint.

II

Admits the allegations contained in paragraphs V, VII, VII, IX and XIV of said complaint.

III

Denies the allegations contained in paragraph X and alleges that plaintiff is a 75 year old widow who had been receiving Old Age Security continuously and in varying amounts since December 1959 to supplement her social security benefits which she currently receives in the amount of $44.60 per month.

IV

Answering the allegations contained in paragraphs XII and XIII of the complaint, this defendant is informed and believes and on the basis of such information and belief alleges that plaintiff was contacted by defendant county on August 30, 1967, and, in that telephone conversation

plaintiff admitted receiving and subsequently transferring the proceeds of a check in the sum of $4,582.15 to her grandson, Bobby Lee Wheeler. On the basis of such information and belief defendant further alleges that no Old Age Security check was withheld until after plaintiff had admitted receiving and disposing of said funds over six months previously and without at any time having notified defendant county of her receipt or transfer of said funds.

Defendant further alleges that while withholding plaintiff's Old Age Security check defendant county granted general assistance funds to plaintiff.

V

Denies the allegations contained in paragraphs XV and alleges that on or about November 2, 1967, defendant county took the following actions with respect to plaintiff:

1. Discontinued Old Age Security, effective August 31, 1967, and cancelled the subsequently withheld warrants, and

2. Requested repayment of all Old Age Security paid to the claimant for the period May 1 through August 31, 1967.

VI

Admits the allegations contained in paragraphs IX and XVI and alleges that the hearing referred to in said paragraphs came on for hearing on December 22, 1967.

That thereafter on January 12, 1968, the defendant John Montgomery, Director of the Department of Social Welfare, adopted the proposed decision of the hearing officer. A copy of said proposed decision of defendant John Montgomery is attached hereto as Exhibit 1. Said decision ordered that the plaintiff's claim be granted and that the defendant County restore Old Age Security, effective September 1, 1967, in the amount to which plaintiff-claimant is otherwise eligible and to cancel any demand made by

defendant county on plaintiff for repayment of Old Age Security for the period of May through August 1967.

VII

Denies the allegations contained in paragraph XIX and alleges that on January 19, 1968, defendant Director held a public hearing pursuant to California Government Code sections 11420 et seq. for the purpose of permitting individuals and others to present and discuss their views in regard to a proposed regulation amending sections 44-325.4, 44-235.44, 40-181.1, 40-181.32, and 40-1255 of the Public Social Services Manual of the State Department of Social Welfare. A copy of said proposed regulation is attached hereto as Exhibit 2. The explanatory statement issued by defendant Director (pursuant to Government Code section 11424) with respect to the proposed amendment of said regulation is attached hereto as Exhibit 3.

Defendant will ask leave of court to amend this Answer following defendant Director's action with respect to said proposed regulations.

Wherefore, defendant prays that plaintiffs take nothing by their complaint on file herein, that said defendant have judgment for his costs of suit herein incurred, and for such other and further relief as to the court may seem proper.

Dated: January 18, 1968

THOMAS C. LYNCH
Attorney General

RICHARD L. MAYERS
Deputy Attorney General

ELIZABETH PALMER
Deputy Attorney General

Attorneys for State Department of Social Welfare, John C. Montgomery, Director.

Exhibit 1 to Montgomery Answer

CONFIDENTIAL

Information in this decision is protected by Section 10850, Welfare & Institutions Code. Violation of this section is a misdemeanor.

Before the Department of Social Welfare
of the State of California

Adopted by the Department of Social Welfare
State of California
Director
Jan. 15, 1968
John C. Montgomery

State No. 38-10-56380

In the Matter of the Hearing of
MAE WHEELER
Claimant

PROPOSED DECISION

SUMMARY

Where it has not been established that the claimant transferred personal property for the purpose of maintaining eligibility to receive Old Age Security (OAS), she was eligible to receive that aid without interruption (Public Social Services Manual Section 41-321).

• • • • •

This matter, originally scheduled for hearing on December 15, 1967, was postponed and then came on for hearing

before Maurice Rosen, Referee for the State Department of Social Welfare, at 9 a.m., December 22, 1967, in Room 400, 1407 Market Street, San Francisco, California. The following persons were present:

Mrs. Mae Wheeler, claimant

Mr. Peter Sitkin, Attorney, Neighborhood Legal Assistance Foundation, and authorized representative of the claimant

Mr. Steven Antler, Law Clerk, Neighborhood Legal Assistance Foundation

Mr. Bobby L. Wheeler, grandson of the claimant

Mr. Arthur Agnos, Assistant Director, Human Relations, San Francisco Housing Authority, and witness for the claimant

Mr. J. P. Dowdall, Director, Social Services Program, San Francisco County Department of Social Services

Mrs. Jane Rand, Division Supervisor, Aged Program, San Francisco County Department of Social Services

Mrs. Anita Yao, Senior Supervisor, Aged Division, San Francisco County Department of Social Services

Mrs. Rosella Rheaume, Social Work Supervisor, Aged Division, San Francisco County Department of Social Services

Miss Geraldine Palmer, Social Worker, San Francisco County Department of Social Services.

Based on the evidence presented at the hearing, the Statement of Fact, Reason for Decision, and Order are as follows:

STATEMENT OF FACT

I

San Francisco County discontinued OAS, effective August 31, 1967, and has requested repayment of OAS granted

during the months of May through August 1967, on the grounds that during April 1967 the claimant had transferred personal property to her grandson in order to maintain her eligibility to receive OAS, and thereby rendered herself ineligible for public assistance as of May 1, 1967.

II

The request for a fair hearing was filed on November 21, 1967.

The claimant maintains that:

1. She transferred the funds in question to her grandson, Bobby Lee Wheeler, in order to carry out the wishes of her dying son, R. L. Wheeler.*
2. She did not make the transfer in order to qualify for aid or to remain eligible for aid.
3. She was and continues to be eligible to receive OAS.

III

The issues in this case are:

1. Whether the claimant transferred personal property in order to qualify for OAS.
2. Whether the claimant was eligible to receive OAS on the point of property during months subsequent to April 1967.*

IV

The claimant, a 75-year-old widow, had been receiving OAS continuously and in varying amounts since December 1959 to supplement her Social Security benefit, currently in the amount of $44.60 per month.

Although suffering from a heart condition and diabetes, she lives alone in a San Francisco Housing Authority apartment.

V

On February 5, 1967, the claimant's son, R. L. Wheeler, an ex-serviceman, died. On or about April 3, 1967, the claim-

*In December 1967, the county restored OAS pendente-lite pursuant to order of the Federal Court.

ant, as beneficiary of her son's veteran's insurance, received from the Veterans Administration a check for $4,528.15 and, on or about April 6, 1967, she turned this amount over to her grandson, Bobby Lee Wheeler.

VI

During the ensuing five months, the claimant was, on several occasions, in touch with her social worker regarding fluctuating needs and annual redetermination of eligibility** but it was not until August 30, 1967 that the county learned from an anonymous caller of receipt by the claimant of the proceeds of her late son's veteran's insurance and the transfer of these proceeds to her grandson.

VII

On or about August 30, 1967, the county placed a hold on the claimant's OAS warrants and, during the ensuing two months, undertook an intensive investigation of the circumstances surrounding the property transfer. There were numerous conferences involving the claimant, as well as her grandson and the assistant director for human relations at the public housing project, for the purpose of evaluating the disposition of the funds received by the claimant from her son's estate.* Although the claimant's OAS warrants were

---

**July 25, 1967.

*The County also learned that, on various dates during the spring and summer of 1967, the claimant had received the following additional proceeds from her son's estate:

1.	Back Wages	$ 110.22
2.	Printers Union benefits	1,100.00
3.	Social Security death benefits	255.00
4.	Veterans death benefit	250.00

However, it was likewise established by the county that the claimant had expended most of these funds for her son's funeral and for legal services in connection with the estate and that therefore, these funds of themselves would presumably not have affected her ongoing eligibility for OAS.

withheld during this period, the county granted some amounts of county general assistance to supplement the claimant's small monthly Social Security benefit.

VIII

On November 2, 1967, the county, having carefully weighed the evidence, including sworn statements of the several parties, in support of the claimant's allegation that she had transferred the insurance proceeds to her grandson because of her promise to her son, concluded that the transfer was in fact a transfer to maintain the claimant's eligibility to OAS and therefore, took the following actions:

1. Discontinued OAS, effective August 31, 1967 and cancelled the subsequent withheld warrants.
2. Requested repayment of all OAS paid to the claimant for the period of May 1 through August 31, 1967, and
3. Determined that the transferred assets, less the $1,200 allowable reserve, would have supported the claimant at the rate of $200 a month for sixteen-and-a-half months, or until September 1968, when she would presumably again qualify for OAS.

IX

In sworn statements submitted prior to the hearing as well as at the hearing, the claimant and her grandson, Bobby Lee Wheeler, declared that:

1. In 1962, the now deceased R. L. Wheeler borrowed from his nephew Bobby Lee Wheeler, $3,000 in order to purchase a home at 447 Heath Street, in Milpitas, California.
2. In 1964, R. L. Wheeler borrowed from Bobby Lee Wheeler, $750 in order to purchase an automobile.
3. After 1964, R. L. Wheeler borrowed smaller sums of money from Bobby Lee Wheeler and, although he made occasional repayments to Bobby Lee

Wheeler, the amount which the uncle owed the nephew by January 1967 totalled $4,200.*

4. Late in January 1967, R. L. Wheeler suffered a massive heart attack and lived for approximately one week thereafter. During the final week of his life, R. L. Wheeler, in the presence of the claimant and Bobby Lee Wheeler, asked the claimant to repay to Bobby Lee Wheeler from the insurance policy he had taken out in the claimant's name many years before, this debt of $4,200.**
5. R. L. Wheeler died on February 5, 1967 and, in accordance with his deathbed request, the claimant repaid to Bobby Lee Wheeler the full proceeds of the veteran's benefits ($4,528.15) which she received in April 1967. It was understood that Bobby Lee Wheeler would then remit to R. L. Wheeler's brother, O. L. Wheeler, of Texas, $300† to reimburse him for expense incurred by him in connection with attendance at R. L. Wheeler's funeral.
6. O. L. Wheeler then insisted that he had spent an additional $200 in connection with his trip to California at the time of his brother's funeral and, upon his insistence that he receive this additional money and to keep the family peace, Bobby Lee Wheeler remitted an additional $200† to O. L. Wheeler, even though this cut into part of the money his uncle R. L. Wheeler had owed to him.

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*Written records were not kept but uncle and nephew were allegedly fully aware of the amounts involved.

**R. L. Wheeler and his nephew Bobby Lee Wheeler had an especially close relationship and, although R. L. Wheeler reportedly owed other persons some $25,000 at the time of his death, he chose to have his nephew repaid from the proceeds of the insurance.

†Money order receipts, in the amounts of $300 and $200 respectively, from Bobby Lee Wheeler to O. L. Wheeler have been viewed by the county representative.

X

The county, in finding that the transfer was a transfer to maintain OAS eligibility, considered that:

1. The claimant, as beneficiary of her late son's veteran's insurance policy, was entitled to receive the proceeds of it to meet her own needs.
2. The claimant withheld information regarding receipt of the insurance proceeds during the period of April through August 1967, although she had ample opportunity to report the facts to her worker.
3. The claimant has been unable to submit adequate supportive documentary evidence to substantiate either Bobby Lee Wheeler's claim of R. L. Wheeler's indebtedness to him or R. L. Wheeler's acknowledgement of any such debt.

XI

At the hearing, the claimant's authorized representative submitted a memorandum and points of law in support of his argument that the claimant was bound by the terms of an oral trust to turn over the proceeds of her son's veteran's pension to her grandson, Bobby Lee Wheeler.

REASON FOR DECISION

I

Section 41-321 of the Public Social Services Manual provides that transfer of property made to qualify for aid results in ineligibility. Circumstances under which the ineligibility is presumed to exist as the result of property transfer includes a transfer of property to reduce the remaining holdings within the statutory maximum.

II

The same section, under the heading of *Interpretation* (guide material), includes the following:

> The reason an applicant transferred property, i.e., his actual intent in doing so, is the single most essential element to be considered in determining the effect of the transfer upon his eligibility. A transfer of property is, in itself, disqualifying only when the transferor's reason for making the transfer was to qualify for aid . . .
>
> In determining the transferor's intent, it is necessary to evaluate his stated reason for the transfer and the consistency of such statement with the known facts. The consideration received for the property transferred may not have been adequate; the transfer may have been ill-advised and/or the transferor, in making the transfer, may have exercised poor judgment. However, these facts alone do not automatically establish that a transfer was disqualifying. The motive of the transfer must be carefully scrutinized, the important determination being the transferor's actual reason for the transfer and the relationship of that reason to his application for aid.

III

We find, on a preponderance of the evidence, that the claimant did not transfer personal property for purposes of qualifying for OAS.

IV

Our conclusion in this respect is based upon the following:

1. In the absence of any internal inconsistencies or other evidence to the contrary, we have credited the testimony of the claimant and Bobby Lee Wheeler that R. L. Wheeler owed his nephew, Bobby Lee Wheeler, $4,200 and that, just prior to his death, he had asked the claimant to repay this debt from the proceeds of his veteran's insurance policy.
2. Because of this deathbed request, the claimant felt that she had a moral, if not legal, duty to transfer

the proceeds of the insurance policy to her grandson.

3. Under these circumstances, it cannot be concluded that the transfer was a transfer to qualify for aid within the meaning of the cited regulation (although there was failure on the part of the claimant to meet her reporting responsibilities).*

ORDER

The claim is granted:

1. San Francisco County shall restore OAS, effective September 1, 1967, in the amount to which the claimant is otherwise eligible.
2. San Francisco County shall cancel any demand for repayment of OAS for the period of May through August 1967.

I hereby submit the foregoing which constitutes my report of the proceedings and proposed decision in the above-entitled matter, and recommend its adoption as the decision of the Director of the State Department of Social Welfare.

/s/ MAURICE ROSEN

.....

Maurice Rosen
Referee

Dated: January 12, 1968

Exhibit 2 to Montgomery Answer

DETERMINATION OF ELIGIBILITY

40-173 COUNTY DEPARTMENT RESPONSIBILITY FOR NOTIFYING APPLICANTS AND RECIPIENTS (Continued)

*cf. Public Social Services Manual Section 40.105.

.4 *Notification When Application is Withdrawn*

Use Form DPA 8, Notice to Applicant Who Withdraws Application. If the county elects to deny the application, use Form ABCD 239.

.5 *Notice to Recipient of his Responsibility*

Use Form 239 C, Important Notice to All Recipients, as specified below:

.51 At the time of the initial warrant on new cases or restorations.

.52 At least semiannually on all continuing cases.

.53 At other times when the county believes notification would be of particular significance. (See Section 40-171.)

.6 *Confirmation of Guidance and/or Suggestions Regarding Sale of Property*

Regarding the sale of his real or personal property, written confirmation shall be given to the applicant or recipient. Such written confirmation shall include a statement regarding the effect of the proposed sale on eligibility. A copy of such confirmation shall be filed in the case record.

40-181 CONTINUING ACTIVITIES AND INVESTIGATION

.1 *General County Responsibility, AB, ATD, OAS, AFDC*

.11 The county paying aid is responsible for continuing investigation to insure payment only to eligible recipients in the correct amount, to assist recipients to meet their financial and service needs as fully as possible, and to make maximum use of their resources and capacities. The decision as to the frequency of investigation is based upon consideration of all pertinent circumstances in each

case. The reinvestigation shall not interfere with the prompt payment of aid unless there are reasonable grounds to suspect that a change has occurred which may result in ineligibility or in overpayment which could not be adjusted within the adjustment period.

Aid shall not be withheld, suspended, or terminated without compliance with Section 44-325.43. In *AB* or *ATD* when disability or blindness is the only eligibility factor that is in question the person shall be considered *medically* eligible such time as an official notification from the State Department of Social Welfare declaring him ineligible is received by the county.

.12 The county is responsible for continuing investigation to identify promptly service needs of the recipient, including medical assistance, and to provide these services. This includes provision of protective services and initiation of guardianship or conservatorship proceedings as needed. (See Services chapter and Section 40-151.)

AID PAYMENTS

44-325 CHANGES IN AMOUNT OF PAYMENT (Cont.)

.11 If the change in the aid payment (as determined in accord with 44-315.5, amounts to less than $2 per month, such change is not to be made. *AFDC*

.12 *Decrease:* Where the required change *is a decrease* of $2 or less, it shall be effective not later than the second month following that in which the changed circumstances were reported, and no adjustment is to be made for overpayment of $2

or less in the month of reporting or in the following month. *ATD*

.13 *Increase:* When the change in circumstances will continue for only one or two months, and the amount of the *increase* would be $2 or less, no change is made in the continuing authorization.

.2 *Change in Income or Need—Known in Advance, AB, ATD, OAS, AFDC*

If a change in income or need is known in advance, any necessary change in the amount of payment is made effective with the month in which the changed circumstances will occur.

.3 *Discontinuance*

If a recipient's circumstances change to the extent that he no longer meets the eligibility requirements, aid

shall be discontinued effective the last day of the month for which the last payment was made. (See Section 44-315 re appropriate action when the recipient is no longer eligible to a cash grant but remains eligible to medical assistance as a medically needy person.)

.4 *Withheld Payment, AB, ATD, OAS, AFDC*

.41 Withheld Payment—Defined
A withheld payment is one which is held beyond the usual delivery date while information concerning needs, income or basic eligibility is investigated, subject to Section 44-325.43.

.42 Limitations on and Requirements for Withholding of Aid Payment Subject to the following limitations, aid payments shall be withheld when further investigation is necessary to determine continuing eligibility.

.421 Recipients should have the assurance of regular and continued aid payment without interruption or delay. Accordingly, an aid payment may be withheld beyond the usual delivery date only when evidence which is both substantial in nature and reliable in source is received by the county, indicating:
a. Probable ineligibility of the recipient, or
b. A probable overpayment has occurred or is occuring which can be adjusted only if aid payment is withheld.

.43 Notification to Recipient when Aid Payment Withheld

The recipient, the parent or other person responsible for the child in AFDC, is to be notified immediately when a warrant is going to be withheld beyond its usual delivery date for any reason other than death. Form ABCD 239, Notice of Action, or a substitute form with the same information, shall be used for this notification. Every notification shall also include:

.431 A statement of what information, if any, is needed or action required to establish eligibility or to determine a correct grant.

.432 Assurance that prompt investigation is being made; that the withheld warrant will be delivered as soon as there is eligibility to receive it; and that the evidence or other information which brought about the withholding action will be freely discussed with the recipient, parent, or other person, if he so desires (see Section .434, below).

.433 A statement of whether, if aid is withheld, the recipient will or will not continue to be certified for medical assistance during the month aid is withheld.

.434 A statement that, at a time and place specifically designated, the recipient, parent, or other person may have the opportunity to meet in person with the caseworker or with another responsible person in the county department in order to enable the recipient, parent or other person

(a) to learn the nature, extent and origin of the information on which the withholding action is based;

(b) to provide any explanation or information, including, but not limited to that described in the notification pursuant to subsection .431, above;

(c) to discuss the entire matter informally for purposes of clarification and, where possible, resolution.

Exhibit 3 to Montgomery Answer

Explanatory statement for revision of PSS 40-181.11, 44-325.41 and 44-325.43

The proposed amendments to Sections 40-181.11, 44-325.41 and 44-325.43 are intended to strengthen and further clarify the current regulations dealing with the action to be taken in connection with withholding, suspension and termination of aid.

40-181.11 Effective 3/1/68

Section 40-181.11 is proposed for amendment by addition of a cross-reference to Section 44-325.43 which will contain the procedure to be followed.

44-325.41 Effective 3/1/68

Section 44-325.41 is proposed for the purpose of adding a cross-reference for the same purpose.

44-325.43 Effective 3/1/68

Section 44-325.43 is proposed for amendment to provide that the individual involved—whether recipient, parent, or caretaker, must be given an opportunity to confer in-

formally with a responsible representative of the county department at a time and place stated in the notification to be sent, for the purpose of becoming fully informed of the nature, extent and basis of the information leading to the county action; to present his side of the story, including any proof he may wish to produce at that time; and in general afford him the kind of "confrontation" declared to be essential in several recent court decisions, and also raised in a number of cases currently pending in the state and federal courts throughout the country including California.

Filed 3/20/68

United States District Court for the Northern District of California

[Title Omitted in Printing]

PRE-TRIAL ORDER [EXCERPT]

* * * * * * *

6. *Admitted and Undisputed Facts*

A. Plaintiff Mae Wheeler is an adult citizen of the United States and a resident of the City and County of San Francisco, State of California.

B. Defendant John Montgomery is the Director of the California Department of Social Welfare and is charged with Statewide administration of the OAS program and with establishing rules and regulations to carry out the statutory provisions of said program.

C. Defendant Ronald Born is General Manager of the San Francisco City and County Department of Social Services and is responsible for administration of the OAS program in the City and County of San Francisco, State of California.

D. The OAS program created by §§ 12,000, *et seq.*, of the California Welfare and Institutions Code provides financial aid to persons over 65 years of age. Persons who meet the statutory criteria receive financial aid as a matter of statutory entitlement.

E. At all times relevant hereto the State of California and defendants, in order to receive Federal funds for the OAS program of the State of California have been required by the Social Security Act, Title 42, U.S.C., §§ 301, *et seq.*, to have formulated a "State Plan" for said program, in conformity with the provisions of the Act and the United States Constitution. The Social Security Act, Title 42, U.S.C., § 302(a)(4), as interpreted by regulations of the United States Department of Health, Education and Welfare, require that a "State Plan" provide for granting an opportunity for a fair hearing before the State agency to any individual aggrieved by an action of a County Department of Social Welfare.

F. Plaintiff Mae Wheeler, a 75 year old widow had been receiving OAS continuously and in varying amounts since December 1959 to supplement her social security benefits in the amount of $44.60 per month.

G. Defendant County received an anonymous telephone call on August 30, 1967, regarding plaintiff's eligibility for OAS. Plaintiff was contacted by defendant County on August 30, 1967, and in that telephone conversation plaintiff stated that she had received and subsequently transferred during April 1967 the proceeds of a check in the sum of $4,582.15 to her grandson, Bobby Lee Wheeler, in accordance with her deceased son's deathbed wish. Mrs. Wheeler's September 1, 1967 warrant was withheld. Defendant County found her eligible for General Assistance funds as of December 1, 1967.

H. Plaintiff Mae Wheeler's minimum monthly need, as of August 31, 1967, was determined by defendants to be $158.55 and was met through direct Social Security benefits of $44.60 and an OAS grant of $113.95. The County agreed to grant General Assistance on December 1, 1967, in the

sum of $53.90 a month which, when added to her Social Security payment, would have given her a monthly income of $98.50. Defendant's withdrawal and termination of her OAS grant caused plaintiff Mae Wheeler immediate and irreparable injury in that she did not have sufficient funds with which to subsist on a day-to-day basis without her full OAS payment.

I. For the reasons set forth in paragraph VIII of the hearing officer's proposed decision, the County on November 2, 1967, discontinued plaintiff's OAS grant effective August 31, 1967. (A copy of said decision, defendant Montgomery's Exhibit A, is incorporated in full herein.)

J. On November 16, 1967, plaintiff filed an appeal with defendant John Montgomery and requested a fair hearing together with a further request that her aid be restored and continued pending a decision after said hearing. The hearing was held on December 22, 1967. On January 12, 1968, defendant John Montgomery, Director of the Department of Social Welfare, adopted the proposed decision of the hearing officer. The decision ordered that the plaintiff's claim be granted and that she be restored to OAS effective September 1, 1967.

7. *Facts at Issue*

A. All OAS recipients are similarly affected by §§ 10950 *et seq.*, and §§ 12200 and 12201 of the California Welfare and Institutions Code, which prescribe the hearing procedure in the OAS program and authorize the *ex parte* termination of OAS grants.

B. County Welfare personnel are authorized to grant financial assistance under the OAS program and other categorical aid programs only in accordance with the rules

and regulations of the State Department of Social Welfare which are mandatory upon all counties.

C. The actions of the County were taken pursuant to the California Welfare and Institutions Code and the regulations of the State Department of Social Welfare.

D. Plaintiff and all OAS recipients have no adequate remedy at law.

E. During the fiscal year ending June 30, 1967 (the latest period for which statistics are available):

(i) there were on the average 285,174 recipients of OAS cash grants monthly;

(ii) there were 23,555 OAS recipients whose grants were discontinued for reasons other than death as is more particularly set forth in the statistics listed *infra* as plaintiff's Exhibit Number 4;

(iii) the average monthly grant for OAS recipients was $101.51;

(iv) there were 3,164 requests for fair hearings filed by all welfare recipients; of these 382 requests for fair hearings were filed by OAS recipients; and

(v) 1,766 requests were finally determined by a published fair hearing decision and 1,279 requests were resolved by other means.

F. As of January 1968, the average time from fair hearing request to publication of decision was approximately six months.

G. During the month of December 1967:

(i) there were 1,210 requests for fair hearings [Appeals] pending on the first of the month; of these 116 were OAS requests;

(ii) 271 additional appeals were received; of these 12 were OAS appeals;

(iii) 254 appeals were disposed of; 179 by fair hearing decision and 75 by other means; of these 32 OAS appeals were disposed of; 16 by decision and 16 by other means; and

(iv) at the end of December 1,227 appeals were pending; of these 116 were OAS appeals.

H. State fair hearing referees have the authority to rule upon the constitutionality and validity of regulations of the State Department of Social Welfare and statutes relating to the OAS program and the other categorical aid programs.

• • • • • • •

California State Department of Social Welfare, Public Social Services Manual

44-325 CHANGES IN AMOUNT OF PAYMENT (effective April 1, 1968)

.43 *Notification to Recipient When Aid Payment is Withheld* (AB, ATD, OAS, AFDC)

The recipient, the parent or other person responsible for the child in *AFDC,* shall be notified, in writing, immediately upon the initial decision being made to withhold a warrant beyond its usual delivery date for any reason other than death, and in no case less than three (3) mail delivery days prior to the usual delivery date of the warrant to the recipient. The county shall give such notice as it has reason to believe will be effective including, if necessary, a home call by appropriate personnel. Form ABCD 239, Notice of Action, or a substitute form, may be used for this purpose. Every notification shall include:

.431 A statement setting forth the proposed action and the grounds therefor, together with what information, if any, is needed or action required to reestablish eligibility or to determine a correct grant.

.432 Assurance that prompt investigation is being made; that the withheld warrant will be delivered as soon as there is eligibility to receive it; and that the evidence or other information which brought about the withholding action will be freely discussed with the recipient, parent, or other person, if he so desires (see Section .434 below).

.433 A statement of whether, if aid is withheld, the recipient will or will not continue to be certified for medical assistance during the month aid is withheld.

.434 A statement that the recipient, parent, or other person may have the opportunity to meet with his caseworker, an eligibility worker, or another responsible person in the county department, at a specified time, or during a given time period which shall not exceed three (3) working days, and the last day of which shall be at least one (1) day prior to the usual delivery date of the warrant, and at a place specifically designated in order to enable the recipient, parent, or other person:

(a) To learn the nature and extent of the information on which the withholding action is based;

(b) To provide any explanation or information, including, but not limited to that described in the notification pursuant to Section .431 above;

(c) To discuss the entire matter informally for purposes of clarification and, where possible, resolution.

United States District Court
for the Northern District of California
No. 48303

Mae Wheeler, individually and on behalf of all others similarly situated,
Plaintiffs,

vs.

John Montgomery, et al.,
Defendants.

MEMORANDUM OPINION AND ORDER DISMISSING ACTION

This is an action for declaratory and injunctive relief. The facts concerning the named plaintiff—Mae Wheeler—are essentially as follows: The county welfare agency received a phone call which informed the county that Mrs. Wheeler had received the proceeds of her deceased son's insurance policy and had transferred the money to her grandson. The county determined that Mrs. Wheeler was therefore ineligible for continued welfare (Old Age Security [O.A.S.]) assistance and terminated her aid without affording her a hearing on the alleged facts prior to termination. On December 20, 1967, Judge Alfonso J. Zirpoli, the single judge to whom the application for a temporary restraining order was originally addressed, signed his memorandum opinion and entered various orders. He found the action to necessitate the convening of a three judge court and found a class action appropriate.

The parties have submitted extensive briefs and exhibits and the matter was submitted to the three judges on April 12, 1968, following oral argument.

With respect to the named plaintiff—Mae Wheeler—she has now been afforded a "fair hearing" and has been found eligible for continued O.A.S. assistance. Furthermore, the claim originally pressed by plaintiff—that at least *some* hearing *prior* to the termination of O.A.S. was constitutionally compelled—has now been conceded by defendants. The State of California, subsequent to Judge Zirpoli's order of December 20, has adopted new regulations which do provide for what plaintiff terms an "informal conference" with the recipient (whose aid the county is about to terminate) and the county agency which is about to make the determination that the recipient is no longer eligible for aid.[1]

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1. Reg. 44-325.43 (effective April 1, 1968), as set forth in CALIFORNIA STATE DEPARTMENT OF SOCIAL WELFARE MANUAL, provides as follows:

44-325.43 *Notification* . . .

The recipient, the parent or other person responsible for the child in *AFDC,* shall be notified, in writing, immediately upon the initial decision being made to withhold a warrant beyond its usual delivery date for any reason other than death, and in no case less than three (3) mail delivery days prior to the usual delivery date of the warrant to the recipient. The county shall give such notice as it has reason to believe will be effective including, if necessary, a home call by appropriate personnel. Form ABCD 239, Notice of Action, or a substitute form, may be used for this purpose. Every notification shall include:

.431 A statement setting forth the proposed action and the grounds therefor, together with what information, if any, is needed or action required to reestablish eligibility or to determine a correct grant.

.432 Assurance that prompt investigation is being made; that the withheld warrant will be delivered as soon as there is eligibility to receive it; and that the evidence or other information which brought about the withholding action will be freely discussed with the recipient, parent, or other person, if he so desires (see Section .434 below).

.433 A statement of whether, if aid is withheld, the recipient will or will not continue to be certified for medical assistance during the month aid is withheld.

Therefore, the only issue remaining before this court is that raised by the class action which contends that the newly adopted regulations are constitutionally inadequate to afford due process at the pre-termination conference. The class contends that the regulations are insufficient in five respects: (1) the conference is with a county official of the agency which has already determined the question of eligibility rather than before an "impartial" referee; (2) the three day notice requirement is too short; (3) no transcript is required to be made or furnished and the decision is not specifically required to be made only on the evidence presented at the conference; (4) the burden of proof is on the recipient to establish eligibility and not on the county to establish ineligibility, and (5) confrontation and cross-examination are not required.

The constitutionality of the "informal conference" must be determined in light of the fact that even if aid is terminated, the State of California must provide the recipient with the kind of hearing plaintiff seeks.[2] At present such

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.434 A statement that the recipient, parent, or other person may have the opportunity to meet with his caseworker, an eligibility worker, or another responsible person in the county department, at a specified time, or during a given time period which shall not exceed three (3) working days, and the last day of which shall be at least one (1) day prior to the usual delivery date of the warrant, and at a place specifically designated in order to enable the recipient, parent, or other person:
(a) To learn the nature and extent of the information on which the withholding action is based;
(b) To provide any explanation or information, including, but not limited to that described in the notification pursuant to Section .431 above;
(c) To discuss the entire matter informally for purposes of clarification and, where possible, resolution.

2. CAL. WELF. & INST. CODE §§ 10950-10965.

"fair hearing" is required to be given within 45 days[3] and a decision rendered within the next 75 days.[4] As of July 1, 1968, the hearing and decision will be required to be made within 60 days.[5]

The court finds that the present California regulations (see note 1) do comport with the due process clause of the fourteenth amendment to the United States Constitution. The State of California having given Mae Wheeler, the named plaintiff, a fair hearing in which she has been found eligible for O.A.S., and having adopted regulations which assure all within the class due process before termination, the purpose of this action has been achieved and this proceeding may, with propriety, now be dismissed.

It is SO ORDERED.

Dated: April 17, 1968

O. D. HAMLIN
United States Circuit Judge

ALBERT C. WOLLENBERG
United States District Judge

ALFONSO J. ZIRPOLI
United States District Judge

Filed April 19, 1968

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3. CAL. WELF. & INST. CODE § 10952.

4. CAL. WELF. & INST. CODE § 10958.

5. HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION § 6200(j), as set forth in Handbook Transmittal No. 140 (attached to Defendants' Trial Brief as Exh. B), provides as follows:

6200. *Requirements for State Plans*

. . .

(j) Prompt, definitive, and final administrative action will be taken within 60 days from the date of the request for a fair hearing. The claimant will be notified of the decision, in writing, in the name of the State agency and, to the extent it is available to him, of his right to judicial review.

Supreme Court of the United States

No. 634 ---- *, October Term, 19* 68

Mae Wheeler et al.,

Appellants,

v.

John Montgomery, etc., et al.

APPEAL from the United States District Court for the Northern District of California.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar. The Solicitor General is invited to file a brief expressing the views of the United States.

April 21, 1969

FILE COPY

OCT 11 1968

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 14

MAE WHEELER, et al.,
Appellants,

vs.

JOHN MONTGOMERY, Director of the STATE DEPARTMENT OF SOCIAL WELFARE, and RONALD BORN, General Manager of the SAN FRANCISCO CITY AND COUNTY DEPARTMENT OF SOCIAL SERVICES,
Appellees.

On Appeal from the United States District Court for the Northern District of California

Jurisdictional Statement

PETER E. SITKIN,
STEVEN J. ANTLER,
SIDNEY M. WOLINSKY,
CHARLES STEPHEN RALSTON,
1095 Market Street,
San Francisco, California 94103,
Telephone: (415) 626-3811.
Attorneys for Appellants

EDWARD V. SPARER,
LEE A. ALBERT,
MICHAEL S. ZOLA,
Of Counsel.

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

MAE WHEELER, et al.,

Appellants,

vs.

JOHN MONTGOMERY, Director of the STATE DEPARTMENT OF SOCIAL WELFARE, and RONALD BORN, General Manager of the SAN FRANCISCO CITY AND COUNTY DEPARTMENT OF SOCIAL SERVICES,

Appellees.

On Appeal from the United States District Court for the Northern District of California

Jurisdictional Statement

Appellants appeal from the judgement of the specially constituted United States District Court for the Northern District of California entered on April 19, 1968, dismissing appellants' action for declaratory and injunctive relief. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the District Court for the Northern District of California dismissing appellants' action is not reported. Copies of the opinion and order dismissing the action are attached hereto as Appendix A. Copies of the opinion and order permitting a class action and certifying the necessity for the convening of a three-judge court are attached hereto as Appendix B. A copy of the temporary restraining order issued by the Court below is attached hereto as Appendix C.

JURISDICTION

This suit was brought on behalf of appellant Mae Wheeler and all others similarly situated for injunctive and declaratory relief under the authority of 42 U.S.C. § 1983, 28 U.S.C. §§ 1343(3) and (4), and 2201 and 2202.

A three-judge court was convened pursuant to 28 U.S.C. §§ 2281 and 2284. The suit was brought for injunctive and declaratory relief against a welfare practice authorized by California statutes which permit the termination of welfare grants without adequate notice and without a hearing, on the ground that said practice violates the Fourteenth Amendment to the United States Constitution. The judgement of the District Court was entered on April 19, 1968, and notice of appeal was filed on June 14, 1968. On July 24, 1968, an application for an extension of time to docket the appeal and file the record was made to Justice William O. Douglas of this Court pursuant to Supreme Court Rule 13 and said application was granted on July 29, 1968. The order provided that the time for docketing the appeal be extended until October 12, 1968.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgement on

direct appeal to this court: *United States v. Georgia Public Social Services Commission*, 371 U.S. 285, 287 (1963); *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73, 75-76 (1960).

STATUTES INVOLVED

California Welfare and Institutions Code, Sections 12200, 12201 and 10950 through 10965, are set forth in Appendix D.

QUESTIONS PRESENTED

1. Does due process permit the termination of a regularly recurring subsistence grant to welfare recipients without adequate notice and without a hearing on the factual questions underlying the decision to cut off assistance?

2. Does an interview with a caseworker or other county welfare official without notice of the evidence relied on for termination and without confrontation or cross-examination satisfy the requirements of the Due Process Clause for a hearing?

STATEMENT

Appellant Mae Wheeler, a 75 year-old unemployed widow, lives alone in an apartment leased to her by the San Francisco Housing Authority. She survives solely on her welfare check of $113.95 per month and her Social Security check of $44.60 per month (D-39, p. 5). Prior to September 1, 1967, Mrs. Wheeler received her welfare check (termed "Old Age Security") every month for almost nine years from the San Francisco County Department of Social Services (hereinafter "County Department") pursuant to the regulations of the California State Department of Social Welfare (hereinafter "California Department"). Mrs. Wheeler did not receive her September 1967 welfare check. Instead, she received a letter from the County De-

partment stating that her welfare grant had been discontinued and setting forth reasons for such action in conformity with the California Department's regulations then in effect which are set forth in Appendix E. Mrs. Wheeler received no welfare aid whatsoever during the months of September, October and November 1967.

Mrs. Wheeler did not secure a hearing before an impartial state referee on the validity of the County Department's discontinuance until December 22, 1967. The impartial referee found the discontinuance to be improper and proposed to the Director of the California Department (Appellee John Montgomery) full restoration of Mrs. Wheeler's welfare assistance. Not until January 12, 1968, over four months after the discontinuance of Mrs. Wheeler's Old Age Security, did the Director adopt the referee's proposed decision and order full restoration of Mrs. Wheeler's welfare assistance. (D-39, p. 6)

During late September and October 1967, Mrs. Wheeler actively but futilely sought restoration of her welfare payments. She talked with her caseworker. She met with a County Department supervisor. She submitted sworn affidavits to the County Department. In November 1967, the County Department confirmed its decision to discontinue Mrs. Wheeler's aid. (D-39, p. 6) Mrs. Wheeler requested a hearing from the California Department and further requested restoration of her welfare payments until a hearing could be held, asserting her lack of food, medicines and other necessities, including inadequate funds for payment of rent. Her request for temporary restoration of payments until a hearing could be held was denied by the California Department.

On December 6, 1967, Judge Alfonso J. Zirpoli of the Court below entered a finding that irreparable injury was

being done to Mrs. Wheeler and issued a temporary restraining order directing the California and County Departments to restore immediately her welfare assistance until a decision was rendered following the hearing to be held by a State referee. (App. C, p. 12a) For three months Mrs. Wheeler subsisted solely on her $44.60 monthly Social Security. But for Judge Zirpoli's intervention that period would have been four and one-half months.

Subsequently, Judge Zirpoli entered a class action order pursuant to Fed. R. Civ. P. 23(b)(2), the class being composed of all Old Age Security recipients in California, and ruled that a determination by a three-judge court was required.[1] He held Mrs. Wheeler to be an adequate representative of the class and on that ground denied a number of motions to intervene in the proceedings. (App. B, p. 5a)

After the three-judge court convened, the California Department[2] adopted a new regulation providing for

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1. Fed. R. Civ. P. 23(c)(1) requires the entry of a class action order at the earliest practical moment in the proceedings. The latest statistics available indicate that there are approximately 285,000 Old Age Security recipients in California. (California Department, *Public Welfare in California—Annual Statistical Report*, Table 3 (1966-1967); Pl. Ex. 4)

2. The Old Age Security program is administered by the county welfare departments in accordance with the rules of the California Department under the direction of Appellee John Montgomery. The rules and regulations of the California Department are established pursuant to the California Welfare and Institutions Code, and in conformity with the requirements of the Social Security Act and with the rules and regulations promulgated by the United States Department of Health, Education, and Welfare (HEW). 49 Stat. 620 (1935), as amended, 42 U.S.C. § 302; see also HEW, Handbook of Public Assistance Administration. The Old Age Security program is one of the three major categorical public assistance programs established by the Social Security Act of 1935, the other two being Aid to Families with Dependent Children and Aid to the Totally Disabled. The programs are financed largely by the Federal Government on a matching fund basis and are administered by the states. *King v. Smith*, 392 U.S. 309, 313, 316 (1968).

an informal conference prior to termination of welfare assistance. A copy of the regulation is set forth in Appendix F, p. 24a.

Holding that California had cured its constitutional deficiency with the new regulation, the Court below dismissed the action on April 19, 1968. (App. A, p. 1a) Appellants contend that the new regulation provides no material change in the procedures which Mrs. Wheeler actually experienced and that those procedures fail to meet the minimum standards of due process of law.[3]

THE QUESTIONS ARE SUBSTANTIAL

I. Introduction.

The fundamental question in this case is whether individuals like Mrs. Wheeler, dependent on public assistance for their basic necessities, may have their recurring subsistence payments arbitrarily denied by local welfare departments without an opportunity to be heard in a full and fair hearing prior to the termination of their welfare payments. This case is but one of an increasing number of suits challenging similar welfare procedures pending in courts throughout the country.[4]

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3. Although the new regulation was not in effect at the time of Mrs. Wheeler's termination, it was always open to a welfare recipient to complain and confer with the local county department; Mrs. Wheeler did indeed complain and confer, but to no avail. (D. 35, pp. 8-17)

4. *McCullough, et al. v. Terzian, et al.*, No. 379011 (Calif. Super. Ct., Alameda Cty., May 2, 1968); *Kelly, et al. v. Wyman, et al.*, Civ. No. 394/68 (S.D.N.Y., May 17, 1968); *Sheafe, et al. v. Wyman, et al.*, Civ. No. 864/68 (S.D.N.Y., May 17, 1968); *Williams, et al. v. Gandy, et al.*, Civ. No. GC 6728 (N.D. Miss., filed June 9, 1967); *Lage, et al. v. Downing, et al.*, Civ. No. 7-2089-C-2 (S.D.Ia., filed Oct. 30, 1967); *Machado, et al. v. Hackney*, Civ. No. 68-108-SA (W.D. Tex., filed April 22, 1968); *Sprayberry, et al. v. Dulaney, et al.*, Civ. No. 11662 (N.D. Ga., filed March 19, 1968); *Jackson, et al. v. Dept. of Public Welfare of the State of Florida, et al.*, Civ. No. 68-568-Civ. E.C. (S.D. Fla., filed May 20, 1968); *Van*

The question here is substantially the same as in *Thorpe v. Housing Authority of the City of Durham*[5] now pending before this Court and scheduled for argument this term. Deeming the issue significant, this Court granted *certiorari* in *Thorpe* on two separate occasions.[6]

A specific demand for prior hearings before termination of public assistance was made by the recent Poor People's Campaign to Wilbur Cohen, Secretary of HEW. Secretary Cohen agreed that this issue was a matter of great concern and stated in his reply that prior hearings would be required.[7] To date, HEW has issued no regulations on this matter.

A lower California state court has rendered an opinion in conflict with the decision below.[8] In another jurisdiction Judge van Pelt Bryan (U.S.D.C., S.D.N.Y.) determined that the two New York prior hearing cases which raise the same issues as herein presented, involve substantial constitutional questions and require the convention of a three-judge court. *Kelly v. Wyman, supra,* and *Sheafe v. Wyman, supra,* n. 4. (Judge Bryan's opinion is set out in full at Appendix I, p. 34a.) The *Kelly, Sheafe* three-judge

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Blaricum v. Dept. of Public Welfare of the State of Ohio, et al., No. 68-78 (S.D. Ohio, March 8, 1968); *Moore, et al. v. Houston*, No. 104435 (Cir. Ct. Wayne Cty. Mich., filed Feb. 23, 1968); and *Diaz, et al. v. Dunn, et al.*, No. 68411F (D. Mass., filed May 15, 1968).

5. *Cert. granted* 390 U.S. 942 (1968) (No. 1003, 1967 Term, renumbered No. 20, 1968 Term).

6. *Cert. granted* 385 U.S. 967 (1966), *remanded*, 386 U.S. 670 (1966), *cert. granted* 390 U.S. 942 (1968).

7. Letter of June 18, 1968, from Wilbur J. Cohen, to the Reverend Ralph Abernathy, Chairman of the Poor People's Campaign and President of The Southern Christian Leadership Conference.

8. *McCullough v. Terzian*, No. 379011 (Calif. Super. Ct., Alameda Cty., May 2, 1968) set out in Appendices G and H, pp. 26a-33a).

court requested the views of the United States Attorney General on the merits.[9]

In addition to the conflict in decisions already present, the possibility of further conflict and confusion arising out of the similar cases pending in nine other jurisdictions hastens the need for Supreme Court guidance. For too long welfare agency action has been free to operate arbitrarily and outside the purview of judicial scrutiny.

II. Prior decisions of this Court require hearings to be timely and adequate.

Due process of law protects every individual from arbitrary state action. *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio,* 301 U.S. 292 (1937). "The play and action of purely personal and arbitrary power" is not to be tolerated. *Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886). This Court has consistently upheld the principle that an individual's essential interests may be acted upon by government only after an opportunity to be heard has been afforded the individual. In *Londoner v. Denver,* 210 U.S. 373, 385 (1908), which involved the assessment of a municipal street improvement tax, the taxpayer had the right to be heard "before the tax became irrevocably fixed." In *Opp Cotton Mills v. Administrator,* 312 U.S. 126 (1941), this Court, in upholding the application of the minimum wage standards of the Fair Labor Standards Act to a textile manufacturer, stated that due process does not:

> "... require a hearing at the initial stage or at any particular point ... in an administrative proceeding so

9. In the other pending cases, *supra,* n. 4, three-judge courts have been convened in Mississippi, Ohio, Texas, Georgia, and Iowa. A lower Michigan state court recently held that failure to provide hearings prior to termination of welfare assistance violated due process of law. *Moore v. Houston, supra,* n. 4 (decided August 30, 1968).

long as the requisite hearing is held before the final order becomes effective." 312 U.S. at 152-53.

Accord, United States v. Illinois Central R. Co., 291 U.S. 457, 463 (1934); *Morgan v. United States*, 304 U.S. 1, 18-19 (1937).

Recently this Court has held that due process requires the government to grant opportunity for a hearing before it terminates a man's employment, *Slochower v. Board of Education*, 350 U.S. 551 (1956); *Cole v. Young*, 351 U.S. 536 (1956); *c.f. Greene v. McElroy*, 360 U.S. 474 (1959); before it may expel a resident alien, *Kwong Hai Chew v. Colding*, 344 U.S. 590, 597-598 (1953); before it may deny a man a license, or certificate of admission, to practice his profession, *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963); *Goldsmith v. Board of Tax Appeals*, 270 U.S. 117, 123 (1926). In addition, a number of recent Court of Appeal decisions have required a hearing: before an individual is disbarred from receiving government contracts, *Gonzales v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964); before retirement pay can be deprived, *Garrott v. United States*, 340 F.2d 615 (Court of Claims, 1965); before a student may be expelled from a state university, *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961), *cert denied*, 368 U.S. 930 (1961); before a municipal hospital terminates a doctor's employment, *Birnbaum v. Trussel*, 371 F.2d 672 (2d Cir. 1966); before a liquor license may be denied, *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964), *rehearing denied*, 330 F.2d 55 (5th Cir. 1964); see also *Quevedo v. Collins*, Civ. Action No. CA 3-2626-C (N.D. Tex., July 12, 1968) (eviction from public housing).

The rationale of the foregoing holdings is that procedural protections are necessary to minimize discretion-

ary abuse, to correct errors before harm is worked, and to avoid arbitrary erosion of individual rights. Welfare is no exception to this rationale; to the contrary, the dangers of error, abuse and invasion are greater due to the dependent relationship between the individual recipient and the understaffed and overworked governmental welfare departments.

Indeed, the questions regarding eligibility and termination involve a host of individual factual determinations;[10] determinations which customarily require a trial-type hearing.[11]

In *Green v. McElroy*, 360 U.S. 474 (1959), this Court stressed the effect on the individual's livelihood of the challenged admistrative action. *Cf. Garrott v. United States, supra,* at 340 F.2d 619. Clearly, termination of Mrs. Wheeler's subsistence grant falls into that category for which due process requires a hearing before action is taken. The mere prospect of retroactive payments cannot fill an empty stomach, pay the monthly rent, or deal with the anxiety of being destitute.

III. California procedures do not afford timely hearings.

The California Department's revised regulation (set forth in Appendix F, p. 24a) provides only for an informal

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10. Factual determinations involving welfare eligibility include intent to transfer property (Mrs. Wheeler), presence of man in the house (Mrs. McCullough), availability of income, possession of excess personal property. Judge Bryan stated in *Kelly* and *Sheafe, supra,* n. 4:

> "It should also be pointed out that the type of questions presented by the termination alleged in the complaint appear to be questions of fact going to the eligibility of the recipients for aid under present standards." (App. I, p. 40a)

11. See *Willner v. Committee on Character and Fitness,* 373 U.S. 96 (1963); *Goldsmith v. Board of Tax Appeals,* 270 U.S. 117 (1926), 1 Davis, *Administrative Law,* §§ 7.01-7.05 (1958 and Supp. 1965).

conference with caseworker personnel of the county departments prior to termination of welfare assistance. The regulation calling for such a conference had not been promulgated at the time of Mrs. Wheeler's termination. However, she did confer informally, more than once, with a County Department supervisor in the manner contemplated by the regulation after termination of her welfare assistance. The conference resulted only in confirmation of the termination by the County Department indicating the inadequacy of the informal conference as a protection for the welfare recipient.

In *McCullough v. Terzian, supra*, n. 4 (the California state court case involving the same California procedures), Mrs. McCullough was afforded an informal conference with a local county department caseworker. She was offered the alternatives of either immediate termination of her welfare assistance or continued aid at a reduced level *provided* she admit to be cohabitating with a man. Mrs. McCullough refused to make such an admission and was ultimately vindicated three and one-half months after her grant had been terminated by an impartial state referee at a full and fair hearing.

IV. The requirements of due process in welfare hearings.

Without reasoned analysis and without supporting authority, the lower court relied upon the newly promulgated regulation to dismiss this action. (App. A, p. 1a) The regulation fails to afford the protection of due process of law; it fails to provide for an impartial referee; it fails to provide for sufficient notice of the informal conference; it fails to provide the welfare recipient adequate time to conduct discovery and otherwise prepare for the conference; it fails to place the burden of proof on the County Department (on the contrary, the burden is upon the wel-

fare recipient to prove she is still entitled to public assistance); it fails to require that a reporter be present at the conference, or that a record of any sort be made, or that the decision resulting from the conference be made upon written findings and conclusions, or even that the decision be based upon the evidence adduced at the conference; and it fails to provide the welfare recipient with the right to confront the evidence against her and to cross-examine witnesses for the County Department. In short, the informal conference procedure does not approach due process of law.[12]

Strict impartiality is required in the welfare context. Recipients are generally submissive and "must depend to a remarkably high degree upon the continued favor of their social workers who are presently vested with wide discretion to authorize or prohibit expenditures." *Parrish v. Civil Service Commission*, 57 Cal. Rptr. 623, 628, 425 P.2d 223, 228 (1967).[13] The California regulation provides an informal conference with the caseworker or another responsible person in the county department. (App. F. p. 25a) In practice, the conference is between the recipient and the same case-

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12. *See Note: Withdrawal of Public Welfare : The Right to a Prior Hearing*, 76 Yale L. J. 1234, 1239 (1967). The authors of a recent law journal article concluded after extensive research that a public assistance hearing must contain, at a minimum, the following elements: notice, discovery, right to counsel, oral hearing, confrontation, cross-examination, impartial tribunal, decision on the record and judicial review. Burrus, *Constitutional Due Process Hearing Requirements in the Administration of Public Assistance*, 16 Am. U. L. Rev. 199, 218 (1967); see also Morris, *Welfare Benefits as Property : Requiring a Prior Hearing*, 20 Admin. L. R. 487 (1968).

13. See also Briar, *Welfare From Below : Recipients' Views of the Welfare System*, 54 Calif. L. Rev. 370 (1966); *Operations Partially Subject to the A.P.A. : Public Welfare Administration*, 44 Calif. L. Rev. 242, 255, 259 (1956). For authority describing the "brittle" and "adversary" relationship between caseworker and recipient, see *Report of the National Advisory Commission on Civil Disorders*, Bantam Books (1968), at pages 457-467.

worker who made the initial decision to terminate welfare payments. On occasion the caseworker's direct supervisor, who has previously confirmed the decision to terminate, participates in the conference procedure.

> ". . . It is too clear to require argument or citation that a fair hearing presupposes an impartial trier of fact and that prior official involvement in a case renders impartiality most difficult to maintain."[14]

This principle of separation of function finds clear expression in the HEW fair hearing regulations which require the states to have their hearings conducted by an "impartial official (or officials) of the state agency." HEW, Handbook of Public Assistance Administration, Pt. IV, § 6300(h).[15]

Equally deprecating to our notion of due process is the inadequate notice provisions in the California regulation. A fundamental requirement of due process is "the opportunity to be heard, at a meaningful time in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Neither the form of notice provided the recipients under the regulation nor the amount of time provided for preparation for the informal conference allows for a meaningful hearing.

The regulation states that recipients are to be informed of the reasons for the termination of welfare payments. "Discontinued due to increased personal property", "Failure to cooperate" or "Failure to provide essential information" are typical reasons given. The regulation provides that the recipient is to be notified of the termination at least three days prior to the withholding of the grant and that the notice shall inform the recipient that an informal con-

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14. *Wasson v. Trowbridge*, 382 F.2d 807, 813 (2d Cir. 1967); see also *Pan American World Airways, Inc. v. Boyd*, 207 F. Supp. 152, 154-155 (D.C. D.C. 1962).

15. See also Administrative Procedure Act, 5 U.S.C. § 554 (1967).

ference may be held at least one day prior to termination, at which time the recipient is to submit all information and affidavits necessary to re-establish eligibility for welfare. California gives the recipient two days to prepare to argue for her livelihood.

Making a record at the lowest level of proceedings is essential to due process of law. *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292 (1937); *U.S. v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 294 U.S. 499 (1935); *Kwock Jan Fat v. White*, 253 U.S. 454 (1920); *Bell Lines, Inc. v. U.S.*, 263 F. Supp. 40 (S.D. W. Va. 1967); and *Travel Service, Inc. v. U.S.*, 263 F. Supp. 302 (D.C., R. I. 1966).

The regulation specifically requires the recipient to carry the burden of re-establishing eligibility for welfare assistance. Once a person has been found eligible for assistance that individual has a statutory right to receive such assistance promptly and without interruption.[16] Such a right is meaningless if it can be destroyed by an *ex parte* decision of the County Department caseworker, thereby once again placing the burden on the recipient to establish eligibility.

The right of confrontation and cross-examination is essential to due process of law in cases involving deprivation of livelihood. *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1962); *Greene v. McElroy*, 360 U.S. 474 (1959); *Reilly v. Pinkus*, 338 U.S. 269 (1949); *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964); *Southern Stevedoring Co. v. Voris*, 190 F.2d 275 (5th Cir. 1951); *Rios v. Hackney*,

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16. The Social Security Act of 1935, as amended, 42 U.S.C. § 302(a) (8); HEW, Handbook of Public Assistance Administration, Pt. IV, § 2200 (1967); *Smith v. King*, 277 F. Supp. 31, 38 (N.D. Ala. 1967), *aff'd*, 392 U.S. 309 (1968); see also *Board of Social Welfare v. County of Los Angeles*, 27 Cal. 2d 81, 162 P.2d 630 (1945); *Sacramento Orphanage and Children's Home v. Chambers*, 25 Cal. App. 536, 144 P. 317 (1914); *County of Alameda v. Jackson*, 16 Cal. 2d 276, 281 (1940).

C.A. 3-1852 (N.D. Tex., Nov. 30, 1967). See also *Gonzales v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964); *Bland v. Connally*, 293 F.2d 852 (D.C. Cir. 1961); *N.L.R.B. v. Prettyman*, 117 F.2d 786 (6th Cir. 1941). This right is absent from the California regulation and from the informal conference.

Thus, an adequate hearing comporting with the fundamental requirements of due process of law is not afforded California welfare recipients prior to termination of their public assistance.

V. HEW regulations require a fair hearing.

The special disabilities of welfare recipients and their dependence on the system for their subsistence has led to the development by HEW of procedural rights in the fair hearing.[17]

Under HEW regulations every state welfare plan must contain certain provisions for a fair hearing: review of local determination by an impartial official of the state welfare department; complete and effective notice; the decision to be based solely on the evidence adduced at the hearing; adequate time for discovery and inspection; opportunity to question or refute testimony or evidence and a prompt decision.[18] There is nothing in the HEW regulations which requires the fair hearing to be held after termination of assistance. Indeed, the regulations expressly permit the continuation of payments pending a hearing decision.[19] The

17. See Scholz, Bernard W., *Hearings in Public Assistance*, Social Security Bulletin, July 1948, at p. 3.

18. HEW, Handbook of Public Assistance Administration, Pt. IV, §§ 6200, *et seq.* (set out in full in App. J., pp. 43a-53a).

19. HEW, Handbook of Public Assistance Administration, Pt. IV, § 6500(b). HEW has specifically stated that federal financial participation is available to California if aid payments continue until a fair hearing decision is rendered. Letter, dated February 9, 1968, from St. John Barrett, Deputy General Counsel, HEW, to Peter E. Sitkin. (Pl. Ex. 1)

informal conference available to California recipients prior to termination does not comport with either the HEW fair hearing regulations or the constitutional mandate of due process of law.

VI. The informal conference prior to termination and the HEW fair hearing after termination do not combine to meet due process of law.

The lower court opinion was based upon a feeling that a combination of the informal conference prior to termination and the fair hearing after termination would jointly create due process of law. Appellants do not seek a certificate of inadequate process, but only one remedy—an effective and timely fair hearing before termination. The informal conference with the County Department caseworker does not provide such a remedy. Hearings provided months after termination cannot undo the harm done by the erroneous denial of a subsistence grant.[20]

VII. Summary of argument.

The requirements of due process in the welfare context must not be any less strict than in other areas of adminis-

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20. HEW requires hearing decisions within 60 days from the date of request. Handbook of Public Assistance Administration, Pt. IV, § 6200 (j). Two months without public assistance has disastrous consequences and results in extreme hardship, witness Mrs. Wheeler's experience. The average time elapsing between a fair hearing request and decision has been six months (D-39, p. 7). At present, California is not meeting the Federal time limits nor is there any evidence that California plans to do so. Appellants' attorneys are personally aware of over 50 cases that have been pending for more than three months. As recently as August 23, 1968, appellants' attorneys were forced to seek judicial redress in order to obtain a fair hearing decision. The decision was finally rendered on September 20, 1968, over six months after the date of request. *James v. Montgomery*, Civil Action No. 592705, Calif. Super. Ct., San Francisco Cty. (September 24, 1968). The two recipients in the *McCullough v. Terzian* case, supra, n. 4, received their fair hearing decisions over three months after their appeals were filed.

trative law. The unique relationship of the recipient and her dependency on the welfare agency, the recipient's lack of resources and skills to effectively articulate her position, the factual nature of the issues presented, and the extent of the injury which a recipient will suffer, must all be considered when determining the extent to which procedural safeguards are required to insure that her interest is fairly and properly protected.

Although the recipient's livelihood is at stake, no meaningful opportunity to demonstrate the error in the County Department's termination is provided until well after the termination has had a direct and fearful impact. Such a procedure allows and encourages arbitrary action. It places recipients at an unfair disadvantage as compared with the County Department caseworker. The dignity of the recipient is lost when it is fear that motivates her relations with her caseworker. Moreover, those recipients who do manage to scrape by when wrongfully terminated are forced to undergo further humiliation and degradation—contrary to the purposes of these categorical aid programs. They are compelled to beg from relatives (who may be poor themselves), charitable institutions, and local businessmen who may extend credit (usually at a stiff price). If the aim of these assistance programs is to protect the dignity of the individual and to foster his independence, due process of law cannot permit summary action by welfare authorities without a prior full hearing.

Addressing the issue, Professor Charles A. Reich has written, concerning public welfare programs generally:

> "In a society where a significant portion of the population is dependent on social welfare, decisions about eligibility for benefits are among the most important that a government can make. By one set of values the granting of a license to broadcast over a

television channel, or to build a hydroelectric project on a river, might seem of more far-reaching significance. But in a society that considers the individual as its basic unit, a decision affecting the life of a person or a family should not be taken by means that would be unfair for a television station or power company. Indeed, full adjudicatory procedures are far more appropriate in welfare cases than in most of the areas of administrative procedure."[21]

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21. Reich, *Individual Rights and Social Welfare : The Emerging Legal Issues*, 74 Yale L. J. 1245, 1253 (1964-1965).

CONCLUSION

It is respectfully prayed that the Court should review the judgment of the District Court and enter a judgment reversing the decision below.

Respectfully submitted,

PETER E. SITKIN,
STEVEN J. ANTLER,
SIDNEY M. WOLINSKY,
CHARLES STEPHEN RALSTON,
1095 Market Street
San Francisco, California 94103.
Attorneys for Appellants

EDWARD V. SPARER,
LEE A. ALBERT,
MICHAEL S. ZOLA,
Of Counsel.

Appendix A

OPINION OF THE COURT BELOW DISMISSING ACTION

United States District Court
for the Northern District of California

No. 48303

Mae Wheeler, individually and on behalf of all others similarly situated,
Plaintiffs,

vs.

John Montgomery, et al.,
Defendants.

MEMORANDUM OPINION AND ORDER DISMISSING ACTION

This is an action for declaratory and injunctive relief. The facts concerning the named plaintiff—Mae Wheeler—are essentially as follows: The county welfare agency received a phone call which informed the county that Mrs. Wheeler had received the proceeds of her deceased son's insurance policy and had transferred the money to her grandson. The county determined that Mrs. Wheeler was therefore ineligible for continued welfare (Old Age Security [O.A.S.]) assistance and terminated her aid without affording her a hearing on the alleged facts prior to termination. On December 20, 1967, Judge Alfonso J. Zirpoli, the single judge to whom the application for a temporary restraining order was originally addressed, signed his memorandum opinion and entered various orders. He found the action to necessitate the convening of a three judge court and found a class action appropriate.

The parties have submitted extensive briefs and exhibits and the matter was submitted to the three judges on April 12, 1968, following oral argument.

With respect to the named plaintiff—Mae Wheeler—she has now been afforded a "fair hearing" and has been found eligible for continued O.A.S. assistance. Furthermore, the claim originally pressed by plaintiff—that at least *some* hearing *prior* to the termination of O.A.S. was constitutionally compelled—has now been conceded by defendants. The State of California, subsequent to Judge Zirpoli's order of December 20, has adopted new regulations which do provide for what plaintiff terms an "informal conference" with the recipient (whose aid the county is about to terminate) and the county agency which is about to make the determination that the recipient is no longer eligible for aid.[1]

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1. Reg. 44-325.43 (effective April 1, 1968), as set forth in CALIFORNIA STATE DEPARTMENT OF SOCIAL WELFARE MANUAL, provides as follows:

44-325.43 *Notification* . . .

The recipient, the parent or other person responsible for the child in *AFDC*, shall be notified, in writing, immediately upon the initial decision being made to withhold a warrant beyond its usual delivery date for any reason other than death, and in no case less than three (3) mail delivery days prior to the usual delivery date of the warrant to the recipient. The county shall give such notice as it has reason to believe will be effective including, if necessary, a home call by appropriate personnel. Form ABCD 239, Notice of Action, or a substitute form, may be used for this purpose. Every notification shall include:

.431 A statement setting forth the proposed action and the grounds therefor, together with what information, if any, is needed or action required to reestablish eligibility or to determine a correct grant.

.432 Assurance that prompt investigation is being made; that the withheld warrant will be delivered as soon as there is eligibility to receive it; and that the evidence or other information which brought about the withholding action will be freely discussed with the recipient, parent, or other person, if he so desires (see Section .434 below).

.433 A statement of whether, if aid is withheld, the recipient will or will not continue to be certified for medical assistance during the month aid is withheld.

Therefore, the only issue remaining before this court is that raised by the class action which contends that the newly adopted regulations are constitutionally inadequate to afford due process at the pre-termination conference. The class contends that the regulations are insufficient in five respects: (1) the conference is with a county official of the agency which has already determined the question of eligibility rather than before an "impartial" referee; (2) the three day notice requirement is too short; (3) no transcript is required to be made or furnished and the decision is not specifically required to be made only on the evidence presented at the conference; (4) the burden of proof is on the recipient to establish eligibility and not on the county to establish ineligibility, and (5) confrontation and cross-examination are not required.

The constitutionality of the "informal conference" must be determined in light of the fact that even if aid is terminated, the State of California must provide the recipient with the kind of hearing plaintiff seeks.[2] At present such

> .434 A statement that the recipient, parent, or other person may have the opportunity to meet with his caseworker, an eligibility worker, or another responsible person in the county department, at a specified time, or during a given time period which shall not exceed three (3) working days, and the last day of which shall be at least one (1) day prior to the usual delivery date of the warrant, and at a place specifically designated in order to enable the recipient, parent, or other person:
> (a) To learn the nature and extent of the information on which the withholding action is based;
> (b) To provide any explanation or information, including, but not limited to that described in the notification pursuant to Section .431 above;
> (c) To discuss the entire matter informally for purposes of clarification and, where possible, resolution.

2. CAL. WELF. & INST. CODE §§ 10950-10965.

"fair hearing" is required to be given within 45 days[3] and a decision rendered within the next 75 days.[4] As of July 1, 1968, the hearing and decision will be required to be made within 60 days.[5]

The court finds that the present California regulations (see note 1) do comport with the due process clause of the fourteenth amendment to the United States Constitution. The State of California having given Mae Wheeler, the named plaintiff, a fair heairng in which she has been found eligible for O.A.S., and having adopted regulations which assure all within the class due process before termination, the purpose of this action has been achieved and this proceeding may, with propriety, now be dismissed.

It is SO ORDERED.

Dated: April 17, 1968

O. D. HAMLIN
United States Circuit Judge

ALBERT C. WOLLENBERG
United States District Judge

ALFONSO J. ZIRPOLI
United States District Judge

Filed April 19, 1968

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3. CAL. WELF. & INST. CODE § 10952.

4. CAL. WELF. & INST. CODE § 10958.

5. HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION § 6200(j), as set forth in Handbook Transmittal No. 140 (attached to Defendants' Trial Brief as Exh. B), provides as follows:

6200. *Requirements for State Plans*

. . .

(j) Prompt, definitive, and final administrative action will be taken within 60 days from the date of the request for a fair hearing. The claimant will be notified of the decision, in writing, in the name of the State agency and, to the extent it is available to him, of his right to judicial review.

Appendix B

OPINION OF THE COURT BELOW PERMITTING CLASS ACTION AND CERTIFYING NECESSITY OF CONVENING THREE-JUDGE DISTRICT COURT.

United States District Court
For the Northern District of California

No. 48303

Mae Wheeler, individually and on behalf of all others similarly situated,
Plaintiffs,

vs.

John Montgomery, individually and in his capacity as Director of the California State Department of Public Welfare, and Ronald Born, individually and in his capacity as General Manager of the San Francisco City and County Department of Social Services,
Defendants.

MEMORANDUM OPINION AND ORDER DENYING CONTINUANCE, ORDER PARTIALLY VACATING PRIOR ORDER, ORDER PERMITTING CLASS ACTION, ORDER DENYING MOTIONS TO INTERVENE, ORDER DENYING MOTION TO MODIFY TEMPORARY RESTRAINING ORDER, NOTIFICATION AND CERTIFICATION OF NECESSITY OF THREE JUDGE COURT.

FACTS AND PROCEEDINGS TO DATE

Plaintiff has filed a complaint, in forma pauperis, seeking injunctive and declaratory relief against a California welfare practice authorized by state statutes which permit the termination of old age security benefits prior to affording the recipient a hearing on his supposed ineligibility. The

statutes which are involved are CAL. WELF. & INST. CODE §§ 12,200, 12,201. The complaint is in the form of a class action.

The facts alleged pertaining to the named plaintiff are as follows: As of August 30, 1967, Mrs. Wheeler was receiving old age benefits in the amount of $113.95. Defendants received information that Mrs. Wheeler had received some $6,000.00 in insurance proceeds and had transferred the money to her grandson. Defendants determined that Mrs. Wheeler's alleged action rendered her ineligible for continued benefits because she had had more money than the maximum permitted while maintaining eligibility.

Mrs. Wheeler's benefit checks had, at the time the suit was filed, been withheld since September 1, 1967, although she came to receive general assistance in the amount of $53.90 until December 1, 1967, the date on which this court heard argument on the propriety of a temporary restraining order restoring old age benefits and on the need for a three judge court.

On December 6, 1967, this court issued a temporary restraining order to avoid irreparable injury to Mrs. Wheeler, the court having been satisfied by plaintiff's showing that such injury was occurring. The court also stayed further proceedings for thirty days to permit Mrs. Wheeler to appeal to a state referee to adjudicate her dispute with the County of San Francisco.

Prior orders in no way were a determination of the merits of plaintiff's claims, but merely endeavored to preserve the status quo pending the court's determination of the questions involving a three judge court and a class action. The court recognizes that the result of the appeal will in no way affect the existence of a case or controversy between the parties over the constitutionality of the statutes

here challenged. No restraining order was issued applicable to any other member of the alleged class because no showing was made of an imminent threat of irreparable harm. The court expressly allowed appropriate showing to be made as instances of threatened irreparable harm arose.

Since December 6, 1967, plaintiff's counsel have made motions for intervention and a motion for modification of the temporary restraining order to include the entire alleged class. The court deems the showings made with respect to persons other than Mrs. Wheeler inadequate to warrant further injunctive relief at this time.

Defendants' counsel have requested a continuance of the argument scheduled on some of the motions and on the questions of the three judge court and class action. Having heard further argument on December 15, 1967, the court deems that no continuance is necessary, that the pleadings constitute a more-than-adequate record on which to base rulings on the matters now pending before the court, and that the court's duty is to determine certain of the questions involved by referring to the complaint in this action. The court is satisfied that any previous stay of these proceedings to permit further argument has been rendered unnecessary by the court's own examination of the issues involved in this case and by further argument and documents filed by the parties.

JURISDICTION: NEED FOR A THREE JUDGE COURT

Plaintiff's basic contention is that to terminate old age benefits without first giving the recipient a hearing is to deny a recipient due process of law. Plaintiff contends that the right to a hearing prior to termination may be found

either in the due process clause, U.S. Const., amend. 14, or in portions of the Social Security Act, specifically 42 U.S.C. § 1382(a)(4) and certain regulations promulgated pursuant thereto. Plaintiff's attack is merely on the procedural method by which aid is terminated. She disclaims any contention that under the facts as alleged by defendants to exist, aid may not be terminated. She merely says that a hearing on the question of eligibility must be held prior to the termination.

Actually, three potential constitutional challenges lurk in the pleadings of this case: (1) California's termination statutes are repugnant to the due process clause of the fourteenth amendment; (2) California's termination statutes are repugnant to provisions of the Social Security Act; (3) if California's termination statutes are not repugnant to the Act, the Act is repugnant to the due process clause of the fifth amendment. While the second enumerated contention does not require a three judge court, *Swift & Co., Inc. v. Wickham,* 382 U.S. 111 (1965), the first and third do, 28 U.S.C. §§ 2281, 2282.

The requirements of § 2281 are satisfied in this case: a state statute is challenged as repugnant on its face to the federal constitution; an injunction is sought; a state officer is a defendant; the statute has statewide application.

This court cannot say the federal question presented is not substantial in the sense that term is used with reference to the propriety of a three judge court. Just "how much due process" is required is a difficult question to decide when administrative proceedings are involved. Also, the precise question presented—whether a hearing prior to administrative action is required—is a difficult question which has engendered considerable debate and litigation. Though not

resolved, a situation strikingly similar to the one in this case has been presented to and reached the Supreme Court. *Thorpe v. Housing Authority of the City of Durham,* 386 U.S. 670 (1967).

Recent years have seen an increasing number of decisions dealing with the question of public entities attempting to terminate "benefits" without hearings. *E.g., Slochower v. Board of Higher Education of New York City,* 350 U.S. 551 (1956); *Wasson v. Trowbridge,* 382 F. 2d 807 (2d Cir. 1967); *Dixon v. Alabama State Board of Education,* 294 F. 2d 150 (5th Cir. 1961), *cert. denied,* 368 U.S. 930 (1961); *Teel v. Pitt County Board of Education,* 272 F. Supp. 703 (E.D. N.C. 1967). *But cf., e.g., Cafeteria & Restaurant Workers Union v. McElroy,* 367 U.S. 886 (1961); *Vitarelli v. Seaton,* 359 U.S. 535 (1959). See also 1 Davis, Administrative Law §§ 7.04-7.20; Silver, *How to Handle a Welfare Case,* 4 Law in Trans. Q. 87, 100 n. 54 and accompanying text (1967); Note, *Federal Judicial Review of State Welfare Practices,* 67 Colum. L. Rev. 84, 93 (1967). Based on a review of the above and other authorities, this court must conclude that the precise federal question presented by this case is substantial and that a three judge court is required to ultimately dispose of the issues.

CONSIDERATIONS PERTAINING TO A CLASS ACTION

The prayer for declaratory and injunctive relief raises common issues of law for each member of the class; namely, whether a termination of benefits without a prior hearing denies a recipient his rights under the United States Constitution. All members of the class are governed by the same California procedures and statutes.

The court concludes that the prerequisites of Fed. R. Civ. P. 23(a) are satisfied. Similarly, the requirement of Fed. R. Civ. P. 23(b)(2) is satisfied.

The foregoing memorandum opinion and the orders which follow dispose of the matters presently scheduled to be heard on January 2, 1968, and of all other preliminary matters now pending before this court. Hence, absent further pleadings by the parties, no further action or appearances will be required of the parties prior to the convening of the three judge court.

ORDERS

1. The court being satisfied that a continuance would serve no useful purpose in disposing of the merits of this case, It Is Ordered that defendants' motion for a continuance is denied.

2. The court being satisfied that further delay in the resolution of pending matters would not aid the court in ruling on such matters, and the court having examined the pleadings and authorities relevant to the rulings made this day, It Is Ordered that any prior order of this court is vacated to the extent such order stayed further proceedings preliminary to the court's ruling on any matter ruled upon this day.

3. Pursuant to Fed. R. Civ. P. 23(a), (b)(2), (c)(1), and (d)(2), It Is Ordered that a class action for declaratory and injunctive relief may be maintained, the class to consist of all recipients of old age benefits subject to California termination statutes, and that plaintiff shall forward to the United States Attorney at San Francisco and to the Secretary of the Department of Health, Education and Welfare, notice of the pendency of this action, together with a copy of the pleadings heretofore filed with the court

and with a copy of this memorandum opinion and these orders.

4. The court being satisfied that the showings heretofore made on behalf of the putative intervenors are not substantial enough to require intervention, and the court being satisfied that the rights of all members of the class will be protected without the intervention, It Is Ordered that all motions to intervene on file on the date of this order are denied.

5. The court being satisfied that the showings heretofore made in support of the motion to modify the temporary restraining order are insufficient to justify further injunctive relief at this time by this court, It Is Ordered that the motion to modify the temporary restraining order is denied without prejudice to such reconsideration as may be appropriate of requests for interim relief.

6. The court will notify the chief judge of the ninth circuit that in this court's opinion a three judge court is required to resolve the issues in this case.

Dated: December 20, 1967

ALFONSO J. ZIRPOLI
United States District Judge

Filed Feb. 20, 1967

Appendix C

TEMPORARY RESTRAINING ORDER ISSUED BY THE COURT BELOW

In the United States District Court
for the Northern District of California, Southern Division

Civil Action No. 48303

Mae Wheeler, et al.,
Plaintiffs,

v.

John Montgomery, et al.,
Defendants.

TEMPORARY RESTRAINING ORDER

The plaintiffs have filed this action to declare unconstitutional California Welfare & Institutions Code Sections 12,200, 12,201 and 10,950, which authorizes the termination, suspension or revocation of financial aid under the Old Age (OAS) program prior to the granting of reasonable and adequate notice and opportunity for a hearing. They have made application for the hearing of this cause for a declaratory judgment, preliminary and permanent injunction before a Three-Judge District Court pursuant to Title 28, United States Code, Sections 2281 and 2284.

This action coming on to be heard on December 1, 1967, on the motion of plaintiffs for a temporary restraining order, and adequate notice having been given to defendants; and the Court having considered the affidavits and memoranda presented and the arguments of counsel for all parties, and being fully advised in the premises, it makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Defendants withheld and thereafter terminated plaintiff Mae Wheeler's aid under the OAS program without affording her reasonable notice and an opportunity for a prior hearing.

2. Plaintiff Mae Wheeler's minimum monthly need as of August 31, 1967 was determined by defendants to be $158.55 and was met through direct Social Security benefits of $44.60 and an Old Age Security grant of $113.95. As a consequence of the termination of Old Age Security, she now has been promised County General Assistance in the sum of $53.90 a month which, when added to her direct Social Security payments totals $98.50 a month.

3. Defendants have refused plaintiff Mae Wheeler's request for restoration and continuation of aid under the OAS program.

4. Defendants' withdrawal and termination of aid and their continued refusal to reinstate plaintiff Mae Wheeler's aid has caused and is causing plaintiff Mae Wheeler immediate and irreparable injury in that she will not have sufficient funds with which to subsist on a day-to-day basis without her full OAS payment.

5. Irreparable injury has been shown only with respect to plaintiff Mae Wheeler and no proof so far has been presented of any others in the class who are likely to suffer immediate and irreparable injury.

CONCLUSIONS OF LAW

Defendants' termination of plaintiff Mae Wheeler's aid under the OAS program pursuant to California Welfare & Institutions Code Sections 12,200 and 12,201 and the regulations promulgated thereunder without a prior hearing and reasonable notice raises a substantial question as to

whether the due process clause of the Fourteenth Amendment to the U.S. Constitution has been violated.

Upon the foregoing, it is, by the United States District Court for the Northern District of California, Southern Division, this 1st day of December, 1967

ORDERED:

1. That the defendants John Montgomery and Ronald Born, their agents, servants, and employees be, and they are hereby restrained effective December 1, 1967 from enforcing against the plaintiff Mae Wheeler the provisions of the California Welfare and Institutions Code Sections 12,200, 12,201, and 10,950, et seq., and implementing the Rules and Regulations of the State Department of Social Welfare, so that Old Age Assistance shall be restored to plaintiff Mae Wheeler forthwith in the amount to which she may be found eligible in order to meet her needs as established under the Old Age Security program until such time as a determination is made by this Court regarding plaintiff's application for convening a Three-Judge Court pursuant to Title 28 U.S.C. 2281 and 2284.

2. That action on plaintiff's application for the convening of a Three-Judge Court shall be deferred for 30 days until January 2, 1968, at 5 p.m. without prejudice to any of the parties herein.

ALFONSO J. ZIRPOLI
District Court Judge

Signed on December 6, 1967.

APPROVED AS TO FORM:
THOMAS C. LYNCH
Attorney General

By ELIZABETH PALMER
Deputy Attorney General

Attorneys for Defendant
JOHN MONTGOMERY

THOMAS M. O'CONNOR,
City Attorney

By.....
Raymond D. Williamson, Jr.
Deputy City Attorney
Attorneys for Defendant Ronald Born

Appendix D

CALIFORNIA WELFARE AND INSTITUTIONS CODE

1. Statutes Governing Suspension of Old Age Security.

§ 12200. Grounds; report of suspension; effect of eligibility for medical assistance. The county may for cause, and upon instructions so to do by the department, shall cancel, suspend, or revoke aid. Upon request of the department, an immediate report of every suspension shall be made to the department stating the reason for the suspension and showing the action of the board of supervisors in approving the suspension.

Eligibility for medical assistance for the aged does not constitute cause for retroactive cancellation, suspension, or revocation of aid.

§ 12201. Notice to recipient. If the board of supervisors, in accordance with Section 12200, cancels, suspends, or revokes aid, the recipient shall be immediately notified in writing of the county's action, the date thereof, and of the reason therefor and the recipient's right to appeal therefrom.

2. Fair Hearing Statutes.

§ 10950. Opportunity; recipient defined. If any applicant for or recipient of public social services is dissatisfied with any action of the county department relating to his application for or receipt of aid or services, or if his application is not acted upon with reasonable promptness, or if any person who desires to apply for such aid or services is refused the opportunity to submit a signed application therefor, and is dissatisfied with such refusal, he shall, in person or through an authorized representative, without the necessity of filing a claim with the board of supervisors,

upon filing a request with the department, be accorded an opportunity for a fair hearing.

As used in this chapter, "recipient" means an applicant for or recipient of aid or services except aid or services exclusively financed by county funds.

§ 10951. Request; time. No person shall be entitled to a hearing pursuant to this chapter unless he files his request for the same within one year after the order or action complained of.

§ 10952. Setting; notice. The department shall set the hearing to commence within 45 days after the request is filed, and, at least 10 days prior to the hearing, shall give all parties concerned written notice of the time and place of the hearing.

§ 10953. Conduct. A hearing under this chapter shall be conducted by referees employed by the department, unless the director orders that it shall be conducted by himself or by the administrative adviser of the department in behalf of the director.

§ 10954. Powers of person conducting. The director, administrative adviser, or referee, in conducting the hearing, shall have all of the powers and authority conferred upon the head of a department in Article 2 (commencing with Section 11180) of Chapter 2 of Part 1 of Division 3 of Title 2 of the Government Code.

§ 10955. Impartiality; informality; evidence; appearance; counsel. The hearing shall be conducted in an impartial and informal manner in order to encourage free and open discussion by participants. All testimony shall be submitted under oath or affirmation. The person conducting the hearing shall not be bound by rules of procedure or evidence applicable in judicial proceedings. At the hearing the appli-

cant or recipient may appear in person with counsel of his own choosing, or in person and without such counsel.

§ 10956. Perpetuation of proceedings. The proceedings at the hearing shall be reported by a phonographic reporter or otherwise perpetuated by mechanical, electronic, or other means capable of reproduction or transcription.

§ 10957. Continuance; commencement of payments on award of aid. The person conducting the hearing, upon good cause shown, may continue the hearing for a period of not to exceed 30 days. When the refusal of a county to accept a signed application for aid or services is an issue, the director may require the county to accept the application, and may continue the case until the results of the investigation have been reported to him. In any such case in which aid is awarded by the director, the payments shall commence at the time indicated by the director.

§ 10958. Referee; proposed decision. If the hearing is conducted by a referee, he shall prepare a proposed decision, in writing and in such form that it may be adopted as the decision in the case, and, after approval of the decision by the chief referee of the department, shall file a copy of the proposed decision, within 75 days after the conclusion of the hearing, with the director.

§ 10959. Director's powers after receipt of proposed decision; rehearing. Within 30 days after receiving a copy of the referee's proposed decision, the director may adopt the decision in its entirety; decide the matter himself on the record, including the transcript, with or without taking additional evidence; or order a rehearing to be conducted by himself, the administrative adviser of the department or another referee in behalf of the director. If the director decides the matter, a copy of his decision shall be served on the applicant or recipient and on the affected county,

and, if his decision differs materially from the proposed decision of the referee, a copy of that proposed decision shall also be served on the applicant or recipient and on the affected county. If a rehearing is ordered, it shall be conducted in the same manner and within the same time limits specified for the original hearing.

§ 10960. Request for rehearing; time; ruling; conduct. Within 30 days after adoption by the director of the proposed decision of a referee or the issuance by the director of his own decision, the affected county or applicant or recipient may file a request with the director for a rehearing and the director, within 10 days after receipt of the request, shall grant or deny the request. If the director grants the request, the rehearing shall be conducted in the same manner and subject to the same time limits as the original hearing.

§ 10961. Director's decision; contents; effect. The decision of the director need not specify the amount of the award to be paid unless the amount of the award is an issue. If the decision is in favor of the applicant or recipient, the county department shall pay to the applicant or recipient, without the necessity of establishing his present need, the amount of aid he is entitled to receive pursuant to the director's decision, payment to commence as of the date the person was first entitled thereto, or grant to him the services to which the director finds he is entitled.

§ 10962. Judicial review. After having exhausted the administrative remedy provided for in Section 10960, the applicant or recipient or the affected county, within one year after receiving notice of the director's final decision, may file a petition with the superior court, under the provisions of Section 1094.5 of the Code of Civil Procedure,

praying for a review of the entire proceedings in the matter, upon questions of law involved in the case. Such review, if granted, shall be the exclusive remedy available to the applicant or recipient or county for review of the director's decision. The director shall be the sole respondent in such proceedings.

No filing fee shall be required for the filing of a petition pursuant to this section. Any such petition to the superior court shall be entitled to a preference in setting a date for hearing on the petition. No bond shall be required in the case of any petition for review, nor in any appeal therefrom. The applicant or recipient shall be entitled to reasonable attorney's fees and costs, if he obtains a decision in his favor.

§ 10963. Compliance with decision. The county director shall comply with and execute every decision of the director rendered pursuant to this chapter.

§ 10964. Digest of decisions. The department shall compile and distribute to each county department a current digest of decisions, properly indexed, rendered under this chapter, and each such digest shall be open to public inspection, subject, however, to the confidentiality requirements set forth in federal and state laws and regulations.

§ 10965. Request on behalf of decedent's estate. Nothing in this chapter shall prevent the filing of the request for a hearing by the legal representative, or, if there is no authorized legal representative, by an heir of a deceased applicant or recipient, in behalf of the decedent's estate, to the end that rights not determined at the time of death shall accrue to the estate of the applicant or recipient.

Appendix E

CALIFORNIA'S RULES FOR WITHHOLDING WELFARE PAYMENTS PRIOR TO THE CONVENING OF THREE-JUDGE COURT BELOW.

California State Department of Social Welfare, Public Social Services Manual:

44-325. CHANGES IN AMOUNT OF PAYMENT

.4 *Withheld Payment* (AB, ATD, OAS, AFDC).

.41 Withheld Payment—Defined

A withheld payment is one which is held beyond the usual delivery date while information concerning needs, income or basic eligibility is investigated.

.42 Limitations on and Requirements for Withholding of Aid Payment

Subject to the following limitations, aid payments shall be withheld when further investigation is necessary to determine continuing eligibility.

.421 Recipients should have the assurance of regular and continued aid payments without interruption or delay. Accordingly, an aid payment may be withheld beyond the usual delivery date only when evidence which is both substantial in nature and reliable in source is received by the county, indicating:

a. Probable ineligibility of the recipient, or

b. A probable overpayment has occurred or is occurring which can be adjusted only if aid payment is withheld.

.422 (AB, ATD, OAS, AFDC) Aid payment shall not be withheld pending ascertainment of increases in federal benefits such as social security or in-

increases in benefits payable by a public agency. (W&IC Section 11014.)

.423 Aid payment shall not be withheld because of actual or probable changes in need or income when it appears that any resulting overpayment can be adjusted in the grant(s) for a subsequent month or months. (See Section 44-335.) (If a recipient will be disadvantaged by delaying the adjustment another month, the county should discuss with the recipient the desirability of an immediate current cash adjustment for the overpayment in lieu of the delayed grant adjustment.)

.424 An initial payment shall not be withheld beyond the month for which it was authorized.

.425 (AFDC) The first installment of a month's *AFDC* aid payment may be withheld if the county's evaluation of circumstances indicates possible ineligibility. If the question cannot be resolved by the end of the first semi-monthly period following that in which it arose, the second payment is always withheld.

Unless the first installment of a month's aid payment has been withheld, the second installment is never withheld except when:

a. Probable or actual ineligibility for the first installment was discovered too late to hold that payment, or

b. Probable overpayment is occurring which can can be adjusted only if the second installment is withheld or if the recipient would be seriously disadvantaged by the delayed adjustment.

For counties on the Subsequent Payment Plan the second installment is never withheld because of changes occurring within the current payment period.

.43 (AB, ATD, OAS, AFDC) Notification to Recipient When Aid Payment is Withheld

The recipient, the parent or other person responsible for the child in *AFDC,* is to be notified immediately when a warrant is withheld beyond its usual delivery date for any reason other than death. Form ABCD 239, Notice of Action, or a substitute form with the same information shall be used for this notification. Every notification shall also include:

.431 A statement of what information, if any, is needed or action required to establish eligibility or to determine a correct grant.

.432 Assurance that prompt investigation will be made and the withheld warrant delivered if there is eligibility to receive it.

.433 A statement of whether the recipient will or will not continue to be certified for medical assistance during the month aid is withheld.

Appendix F

EXCERPTS FROM REVISED CALIFORNIA RULES FOR WITHHOLDING WELFARE PAYMENTS ESTABLISHING "INFORMAL CONFERENCE" EFFECTIVE APRIL 1, 1968.

California State Department of Social Welfare, Public Social Services Manual:

44-325 CHANGES IN AMOUNT OF PAYMENT

.43 *Notification to Recipient When Aid Payment is Withheld* (AB, ATD, OAS, AFDC)

The recipient, the parent or other person responsible for the child in *AFDC,* shall be notified, in writing, immediately upon the initial decision being made to withhold a warrant beyond its usual delivery date for any reason other than death, and in no case less than three (3) mail delivery days prior to the usual delivery date of the warrant to the recipient. The county shall give such notice as it has reason to believe will be effective including, if necessary, a home call by appropriate personnel. Form ABCD 239, Notice of Action, or a substitute form, may be used for this purpose. Every notification shall include:

.431 A statement setting forth the proposed action and the grounds therefor, together with what information, if any, is needed or action required to reestablish eligibility or to determine a correct grant.

.432 Assurance that prompt investigation is being made; that the withheld warrant will be delivered as soon as there is eligibility to receive it; and that the evidence or other information which brought about the withholding action will be freely discussed with the recipient, parent, or

other person, if he so desires (see Section .434 below).

.433 A statement of whether, if aid is withheld, the recipient will or will not continue to be certified for medical assistance during the month aid is withheld.

.434 A statement that the recipient, parent, or other person may have the opportunity to meet with his caseworker, an eligibility worker, or another responsible person in the county department, at a specified time, or during a given time period which shall not exceed three (3) working days, and the last day of which shall be at least one (1) day prior to the usual delivery date of the warrant, and at a place specifically designated in order to enable the recipient, parent, or other person:

(a) To learn the nature and extent of the information on which the withholding action is based;

(b) To provide any explanation or information, including, but not limited to that described in the notification pursuant to Section .431 above;

(c) To discuss the entire matter informally for purposes of clarification and, where possible, resolution.

Appendix G

FINDINGS OF FACT AND CONCLUSIONS OF LAW McCULLOUGH v. TERZIAN

In the Superior Court of the State of California in and for the County of Alameda

No. 379011

Mary McCullough, Melvin McCullough, Michael Johnson and Rosaline Johnson, by their Guardian Ad Litem Mary McCullough, individually and on behalf of all persons receiving Public Assistance under the Categorical Aid Programs in the State of California,

Petitioners,

vs

Hrayr Terzian, Director of the Alameda County Welfare Department, John Montgomery, Director of the Department of Social Welfare of the State of California,

Respondents.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for hearing before Department One of the above-entitled court, Honorable Lewis E. Lercara presiding, on April 25, 1968. Petitioners having filed their petition for writ of mandate and Complaint for declaratory relief, appeared by David Nawi of the Legal Aid Society of Alameda County. Respondent John Montgomery, Director of the State Department of Social Welfare, and, Respondent, Hrayr Terzian, Director of the Alameda County Welfare Department, appeared by Elizabeth Palmer, Deputy Attorney General and Ben H. Zuppan,

Deputy County Counsel. A Stipulation of Facts having been filed, arguments having been presented and the matter having been submitted for decision, the Court makes the following:

FINDINGS OF FACT

1. At all times relevant herein, petitioners Melvin McCullough, age three, Rosaline Johnson, age two, Michael Johnson, age one and Mary McCullough, their mother, were recipients of public assistance under the State Aid to Families with Dependent Children and, until April 1, 1968, they were receiving $209.00 per month for their maintenance and support from the Alameda County Welfare Department.

2. Respondent, John Montgomery, is the Director of the Department of Social Welfare for the State of California and is charged with the state-wide administration of the laws pertaining to Public Social Services, including Welfare and Institutions Code Section 11458.

Respondent, John Montgomery is the only person authorized to adopt regulations to implement the laws relating to public social services in California.

Respondent, Hrayr Terzian, is the Director of the Alameda County Welfare Department and is responsible for the administration of the laws and regulations governing public social services program, including Aid to Families with Dependent Children, in the County of Alameda.

3. On or about March 26, 1968 the Alameda County Welfare Department notified petitioner, by mail, that the warrants due on April 1 and April 16 had been withheld for "clarification of current living arrangement due to FSD report of man in the home since June, 1967". On or about March 27, 1968, petitioner was visited by her social

worker. Her eligibility was discussed and she was advised that if she admitted that a man was or had been living with her, her grant would be adjusted—that if she denied it, she would receive no further benefits. Petitioner denied the allegations and on or about March 29, 1968, she received a County "Notice of Action" form stating that her "case is being discontinued effective 3/31/68 because of failure to provide essential information." A fair hearing was requested by petitioners on March 28, 1968.

4. The notices sent petitioner provided that she could discuss her problem with her social worker and that all facts and any further information she wished to present would be given careful consideration.

5. Respondents have substantially complied with the provisions of State Department of Social Welfare Public Social Services Manual Section 44-325.43.

6. Petitioners do not have the means necessary to maintain a minimum level of subsistence and will suffer undue hardship and irreparable injury by reason of the withholding of benefits.

7. Petitioners represent the class of persons receiving public assistance under categorical aid programs in the State of California. The class is so numerous that the joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the representative parties are typical of the class; and the representative parties will fairly and adequately represent the class.

CONCLUSIONS OF LAW

1. That the W & I Code and the due process clauses of the U. S. and California Constitutions require a hearing prior to the termination, withdrawal or suspension of aid

to recipients of public assistance under categorical aid programs.

2. That the hearing required must as a minimum provide for a decision to be made by an impartial person or body not previously connected with the case and that the decision be based solely on the evidence presented at a hearing pursuant to elementary procedural safeguards.

3. That respondents failed to provide petitioner Mary McCullough such a hearing prior to the termination of her aid and section 44-325.43 does not provide the hearing required.

4. That petitioners have no plain, speedy and adequate remedy in the ordinary course of law and have no adequate administrative remedy available to them.

5. That judgment should issue accordingly.

Dated: May 2 1968

LEWIS E LERCARA
Judge of the Superior Court

Filed May 2, 1968

Appendix H

JUDGMENT—McCULLOUGH v. TERZIAN

Endorsed—Filed May 2, 1968
Jack G. Blue, County Clerk
Thomas E. Donato, Deputy

In the Superior Court of the State of California in and for the County of Alameda

No. 379011

Mary McCullough, Melvin McCullough, Michael Johnson and Rosaline Johnson, by their Guardian Ad Litem Mary McCullough, individually and on behalf of all persons receiving Public Assistance under the Categorical Aid Programs in the State of California,

Petitioners,

vs

Hrayr Terzian, Director of the Alameda County Welfare Department, John Montgomery, Director of the Department of Social Welfare of the State of California,

Respondents.

JUDGMENT

This matter came on for hearing before Department One of the above-entitled court, Honorable Lewis E. Lercara presiding, on April 25, 1968. Petitioners having filed their petition for writ of mandate and complaint for declaratory relief, appeared by David Nawi of the Legal Aid Society of Alameda County, Respondent John Montgomery, Director of the State Department of Social Welfare, and Hrayr Terzian, Director of the Alameda County Welfare Depart-

ment, appeared by Elizabeth Palmer, Deputy Attorney General and Ben H. Zuppan, Deputy County Counsel. A Stipulation of Facts having been filed, arguments having been presented and the matter having been submitted for decision, and the Court having made Findings of Fact and Conclusions of Law which have been signed and filed,

It Is Ordered That:

A Peremptory Writ of Mandate shall issue from this Court commanding respondents John Montgomery, Director of the State Department of Social Welfare, and Hrayr Terzian, Director of the Alameda County Welfare Department, and each of them to set aside and reconsider their action withdrawing aid under the Aid to Families with Dependent Children (AFDC) program from petitioners Mary McCullough, Melvin McCullough, Michael Johnson and Rosaline Johnson in light of this Court's Findings of Fact and Conclusions of Law and to:

1. Provide said petitioners with the assistance to which they are otherwise entitled without regard to any adjustment required by or based on the determination of the Alameda County Welfare Department that a man is or was living in the home of petitioners;

2. Provide the fair hearing and decision requested by said petitioners pursuant to the provisions of Section 10950 et seq. of the W & I Code within thirty days hereof;

3. Provide said aid as of April 1, 1968 and continue to provide said aid until such time that a determination if any of ineligibility is rendered pursuant to said hearing, provided that respondents may require petitioner Mary McCullough to complete an affirmation of eligibility form CA-201 as a condition of the continuation of said payments.

It Is Declared That:

Section 44-325 of the State Department of Social Welfare, Public Social Services Manual before and as amended effective April 1, 1968 is invalid because and to the extent that it does not provide a hearing with adequate procedural safeguards including a decision based solely on the evidence produced at the hearing and rendered by an impartial person or body not previously connected with the case, prior to the withdrawal or termination of public assistance benefits under the Aid to Families with Dependent Children, Old Age Security, Aid to Needy Disabled and Aid to Blind programs as required by State law and United States and California Constitutions.

It Is Further Ordered That a peremptory writ of mandate shall issue from this court commanding respondent John Montgomery, Director of the State Department of Social Welfare to:

Restore or continue to provide the public assistance benefit to which recipients are otherwise entitled under the AFDC, Old Age Security, Aid to Disabled and Aid to Blind programs, whose benefits will be or have been terminated under said programs until a decision if any of ineligibility is rendered after a hearing provided by W & I Code section 10950 et seq. or the equivalent thereof.

Provided that no public assistance benefits under said programs may be terminated or withheld without the advance written notice required by Public Social Services Manual Section 44-325.43.

Provided further that to be eligible for the relief afforded herein the affected recipients must file with the State Department of Social Welfare a request for a fair hearing provided by W & I Code section 10950 et seq. and that such recipients must file with the County Department adminis-

tering aid a sworn statement in writing which controverts the essential allegations of ineligibility and which includes a statement of all current income and resources the aid shall be restored from the date of filing of the request for fair hearing, or the date of filing the above-described statement with the County Department, whichever shall be later;

Provided further that any recipient whose aid has already been withheld or terminated prior to the date hereof and who had not received a fair hearing decision or who is eligible for a fair hearing under the law may file the statement above-described with the County Department and the request for fair hearing and thereupon shall be restored to aid as above provided.

Dated: May 2, 1968

/s/ LEWIS E. LERCARA
Judge of the Superior Court

Filed May 2, 1968

Appendix I

OPINION

KELLY, ET AL. v. WYMAN, ET AL.,
SHEAFE, ET AL. v. WYMAN, ET AL.

United States District Court
Southern District of New York

John Kelly, et al., *Plaintiffs,* —against— George K. Wyman, et al., *Defendants.*	68 Civ. 394
Ruby Sheafe, et al., *Plaintiffs,* —against— George K. Wyman, et al., *Defendants.*	68 Civ. 864

MEMORANDUM

Bryan, District Judge:

The present suit is one of the growing number in which welfare recipients are challenging the fairness of the procedures by which the system of public assistance is administered. See, e.g., Thompson v. Shapiro, 270 F. Supp. 331 (D. Conn. 1967), prob. juris. noted, 36 U.S.L. Week 813 (Jan. 15, 1968); Smith v. King, 277 F. Supp. 331 (M. D. Ala. 1967), prob. juris. noted, 36 U.S.L. Week 3297. The eight individual plaintiffs in this consolidated action are all New York City residents whose welfare assistance has been terminated without a prior hearing. They attack the validity of the rules and regulations promulgated by the defendants—the Commissioner of the State Department of Social Services, the individual members of the State Board

of Social Welfare, and the Commissioner of the New York City Department of Social Services—which permitted termination of assistance prior to hearing.

The complaint, seeking declaratory and injunctive relief, is based on the Civil Rights Act, 42 U.S.C. § 1983. Jurisdiction is alleged under 28 U.S.C. §§ 1343(3)(4). Plaintiffs have moved for convocation of a three-judge court pursuant to 28 U.S.C. §§ 2281-84, a preliminary injunction, and a class action order pursuant to Rule 23(c), F.R.C.P. Defendants have moved to dismiss the complaint for failure to state a claim upon which relief can be granted, for mootness, and for want of standing to sue.

The individual plaintiffs fall into two groups. Four of them—Kelley, Young, DeJesus and Sheafe—were recipients of Home Relief pursuant to N.Y. Soc. Welfare Law §§ 167-65, a state and locally funded program not subject to the requirements of the Social Security Act. At the time this complaint was filed, the state regulations evidently did not require a hearing either prior or subsequent to termination of home relief assistance. On January 16, 1968, however, the defendant State Board amended the regulations concerning fair hearings subsequent to termination and made them applicable to Home Relief recipients. See 18 N.Y.C.R.R. pt. 84.3-.23. In addition, home relief recipients are evidently covered by the new procedure for a limited local review prior to termination, pursuant to Regulation 351.26 of the State Department of Social Services, promulgated April 26, 1968.[1]

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1. When this suit was commenced no prior hearing of any sort was provided. In response to the present action, and similar actions in other states, the State Department promulgated Regulation 351.26, effective March 1, 1968. This regulation was unacceptable to the City Department. After negotiations between the City and State Department the new regulation, which provides local agencies with two options, was adopted.

The remaining four plaintiffs—McKinney, Frye, Guzman and Lett—were recipients of Aid to Dependent Children. N.Y. Soc. Welfare Law §§ 343-62. ADC is one of the federally assisted categorical aid programs administered under the Social Security Law, 42 U.S.C. §§ 601-09 (1964), as amended (Supp. I, 1965). Pursuant to the mandate of the federal statute,[2] 42 U.S.C. § 602(a)(4), the state statute provides a fair hearing subsequent to termination. N.Y. Soc. Welfare Law § 353. Present recipients of ADC faced with termination would also be entitled to the notice and local review provided by new Regulation 351.26, and the New York City plan implementing that regulation approved by the State Department May 1, 1968.

The plaintiffs' basic claim is that the state cannot, consonant with due process, terminate public assistance without affording the recipient a prior hearing. They point to the cases requiring a hearing at a meaningful point in the administrative process,[3] and argue that the extraordinary hardship worked upon a recipient by loss of aid compels the conclusion that the meaningful point for hearing is

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2. While § 602(a)(4) is not clear as to when a fair hearing must be held, the HEW regulation thereunder implies that a hearing after termination or suspension is sufficient. See HEW, Handbook of Public Assistance Administration pt. IV, § 6331. A claim of inconsistency between a state statute or regulation and a federal statute, however, does not warrant convocation of a three-judge court. Swift & Co., Inc. v. Wickham, 382 U.S. 111 (1965). But if the jurisdiction of the three-judge court is otherwise properly invoked, it is free to decide the case on the ground that the state statute conflicts with the federal law, or that the federal regulation is not authorized by the federal statute. See United States v. Georgia Public Service Comm'n, 371 U.S. 285 (1963); Sterling v. Constantin, 287 U.S. 378 (1932).

3. See Opp Cotton Mills, Inc. v. Administrator, 312 U.S. 126, 152-53 (1941); Morgan v. United States, 304 U.S. 1 (1938); Londoner v. Denver, 210 U.S. 373 (1908); compare Armstrong v. Manzo, 380 U.S. 545 (1965); Thorpe v. Housing Authority of Durham, 386 U.S. 670 (1967).

prior to termination. See Note, Withdrawal of Public Welfare: The Right to a Prior Hearing, 76 Yale L.J. 1234 (1967). The defendants apparently agree with this proposition, since, as explained earlier, they have amended the rules to provide for review at the local level prior to termination. In supplementary filed papers, the plaintiffs have challenged the adequacy of the procedures provided by new Regulation 351.26 to satisfy the requirements of due process.

I.

Does the case in its present posture require convocation of a three-judge court? The defendants raise several objections at the outset.

First, they argue that the individual plaintiffs, having failed to invoke the fair hearing procedure after their terminations, have not exhausted their available remedies. While this procedure would only have been available to four of the plaintiffs, in my view exhaustion of a remedy of this sort is not required in a case brought under 42 U.S.C. § 1983. See Damico v. California, 389 U.S. 416 (1967) (per curiam); McNeese v. Board of Education, 373 U.S. 668 (1963).

Second, defendants urge that the case is moot, based on affidavits showing that most of the plaintiffs are now receiving public assistance on an emergency basis. Judicial determination of questions of this importance cannot thus be evaded and, in any event, dismissal is not appropriate when the individuals purport to represent a class.

Finally, noting that the thrust of plaintiffs' complaint is directed at state and local administrative regulations, defendants argue that a three-judge court is not required under 28 U.S.C. § 2281. This claim is not without merit, particularly in view of the traditional reluctance of courts, based on needs of judicial economy, to invoke the three-

judge procedure. See United States v. Interstate Commerce Commission, 337 U.S. 426 (1949); Utica Mutual Ins. Co. v. Vincent, 375 F.2d 129, 130-31 (2d Cir. 1967). However, where the regulations are of broad applicability, and embody legislative policy on a state-wide basis, three-judge courts have been deemed appropriate. See Oklahoma Gas Co. v. Russell, 261 U.S. 290 (1923); Note, Federal Review of State Welfare Practices, 67 Colum. L. Rev. 84, 106-08 (1967); compare McWood Corp. v. State Corporate Comm'n, 237 F. Supp. 963 (D. N.M. 1965). In my view, a three-judge court is appropriate where, as here, the regulations attacked implement important state social and economic policy.

II.

The remaining question is whether the constitutional issues presented by the complaint, in the present posture of the case, are substantial. Defendants urge that the procedures provided by Regulation 351.26 fully satisfy the requirements of due process and, in essence, meet the demands of the original complaint. Plaintiffs, on the other hand, claim several deficiencies in the new procedures and to illustrate their objections, contrast the new regulation with the procedures provided upon a fair hearing after termination. Specifically, they complain that the new procedures do not provide for confrontation and cross-examination of witnesses, or for an independent hearing examiner.[4] The rules governing fair hearings, on the other hand, plainly provide for confrontation and cross-exam-

4. Regulation 351.26 provides local agencies with two options. Under subdivision (a) the local agency must give seven days written notice before suspension of aid, specifying the reasons for suspension. The recipient is entitled to appear before a local social services official occupying a position superior to the person who approved the suspension, and present oral and written relevant evidence and reasons on his behalf, with the aid of counsel or other representative. The official then reviews the evidence with

ination, and are held before state hearing officers specially employed for this purpose. In short, plaintiffs' demand is for a trial-type hearing prior to termination, rather than a documentary review.

Cases requiring that administrative hearings be held before agency action directly affecting personal well-being becomes final are increasingly common. See, e.g., Gonzalez v. Freeman, 334 F.2d 570 (D.C.Cir. 1964); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964); Homer v. Richmond, 292 F.2d 729 (D.C.Cir. 1961). These cases, however, shed little light on the type of hearing required. One test which seems to be evolving requires the court to balance the private right against the government interest to determine the nature of the hearing. See Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967); Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1961). A trial-type hearing is more often required where the matter to be adjudicated relates to an individual's eligibility under or compliance with established standards, rather than a question of the validity of the standards themselves. See Willner v. Committee on Character, 373 U.S. 96 (1963); Goldsmith v. Board of Tax Appeals, 270 U.S. 117 (1926); 1 Davis, Administrative Law §§ 7.01-.05 (1958 & Supp. 1965).[5] In resolving ques-

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the recipient and his representative and makes his decision.

Under subdivision (b), the option elected by New York City, the same notice requirements prevail. No oral evidence or witnesses, however, are permitted. The recipient or his representative is only entitled to submit in writing a statement or other evidence demonstrating why his grant should be continued. The local official then reviews the case file, and the statement submitted by the recipient, and makes his determination.

5. Where the questions presented raise only issues of law, trial-type hearings are not required. See F.C.C. v. W.J.R., 337 U.S. 265 (1949). Nor is confrontation or cross-examination required where the hearing is deemed investigatory, see Hannah v. Larche, 363 U.S. 420 (1960); Anonymous No. 6 v. Baker, 360 U.S. 287 (1959), or the ruling made is simply advisory. See Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294 (1933).

tions of a factual nature, it is felt that the traditional safeguards of confrontation and cross-examination are required. Cf. Greene v. McElroy, 360 U.S. 474 (1959).

In my view the question of whether a trial-type hearing is required before termination of welfare benefits presents a substantial constitutional issue. The burden placed upon the state and local governments by having to continue to make payments during the pendency of the hearing and decision is slight and has already been assumed by them under the present regulation. The demand that full hearings would make upon agency manpower and funds is no doubt more substantial. When contrasted, however, with the plight of a recipient cut off from all aid while waiting for a full hearing upon appeal to the state agency, I cannot say that the answer is so clear as to make the issue presented constitutionally insubstantial.

It should also be pointed out that the type of questions presented by the terminations alleged in the complaint appear to be questions of fact going to the eligibility of the recipients for aid under present standards. The complaint does not challenge any of the standards purportedly relied on by the defendants in terminating assistance, but only the application of those standards to the individual plaintiffs. Questions of this sort are customarily resolved by trial-type hearings.

Finally, in three other cases presenting similar issues, three-judge courts have been convoked. See Williams v. Gandy, Civ. No. GC6728 (N.D.Miss.1967); Wheeler v. Montgomery, Civ. No. 48303 (W.D.Calif.1967); Laze v. Downing, Civ. No. 7-2089-C-2 (S.D. Iowa 1967). Consequently, I conclude that the issues presented by this complaint are not insubstantial and should be heard by a three-judge court pursuant to 28 U.S.C. §§ 2281-84.

III.

Plaintiffs have also moved for an order pursuant to Rule 23(c) F.R.C.P., permitting this case to be maintained as a class action. That rule provides that such a determination shall be made "as soon as practicable after the commencement of an action brought as a class action." While it may be that common questions of law and fact are present here, none of the parties has submitted facts from which I could determine the membership of the class, the adequacy of plaintiffs' representation of the class, the question of possible sub-classes, or the type of notice which would be required. Therefore, I conclude that it is not yet practicable to make the determination required by Rule 23(c).

IV.

Plaintiffs also pray for a temporary injunction directing that defendants restore the individual plaintiffs to the welfare rolls and refrain from terminating benefits of other recipients without prior hearings. Since it appears that the individual plaintiffs are presently receiving some benefits, at least on an emergency basis, and in view of the promulgation of the new regulations providing for a form of hearing prior to termination, I do not feel that a temporary injunction is required at this time pending hearing before the full court on the merits.

V.

In accordance with these views, I will notify the Chief Judge of this Circuit that the consolidated action should be heard before a three-judge court pursuant to 28 U.S.C. §§ 2281-84. The defendants' motion to dismiss for failure to state a claim upon which relief can be granted should

also be heard before the full court. Plaintiffs' motion for temporary injunctive relief is denied.

It is so ordered.

Dated: New York N.Y.
May 17, 1968

/s/ FREDERICK vP. BRYAN
United States District Judge

Appendix J

EXCERPTS FROM PART IV OF THE HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE.

Handbook of Public Assistance Administration
Part IV Eligibility, Assistance, and Services

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6000. *Fair Hearings*

6100. *Provisions of the Act*

(a) Sections 2(a)(4), 402(a)(4), 1002(a)(4), 1402(a)(4), and 1602(a)(4) read as follows:

"A State plan . . . must . . .

"provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for . . . [aid or assistance under the plan] is denied or is not acted upon with reasonable promptness."

(b) Sections 6(a)(5), 406(b)(2)(E), 1006(5), 1405(5), and 1605(a)(E) authorize Federal financial parti-

cipation in protective payments "but only with respect to a State whose State plan . . . includes provision for . . .

"opportunity for a fair hearing before the State agency on the determination . . . [of need for protective payment] for any individual with respect to whom it is made."

6200. *Requirements for State Plans*

A State plan for OAA, AFDC, AB, APTD, or AABD must provide that:

(a) The State agency will be responsible for fulfillment of fair hearings provisions, and shall specify the hearing authority.

(b) An opportunity for a fair hearing before the State agency will be granted to any individual requesting a hearing because his claim for assistance is denied, is not acted upon with reasonable promptness, or because he is aggrieved by any other agency action affecting his receipt or termination of assistance, or by agency policy as it affects his situation.

(c) Decisions by the hearing authority, rendered in the name of the State agency, will be binding on the State and local agency. The State agency will establish and maintain a method for informing, at least in summary form, all local agencies of all fair hearing decisions by the hearing authority, and the decisions will be accessible to the claimants, their representatives, and the public (subject to provisions relating to safeguarding public assistance information).

(d) The hearings will be conducted by an impartial official (or officials) of the State agency.

(e) Hearing procedures will be issued and publicized by the State agency for the guidance of all concerned.

(f) Every claimant will be informed in writing at the time of application and at the time of any agency action affecting his claim

(1) of his right to a fair hearing;

(2) of the method by which he may obtain a hearing;

(3) that he may be represented by others including legal counsel; and

(4) of any provision for payment of legal fees by the agency.

(g) The hearing will be conducted at a time, date, and place convenient to the claimant, and adequate preliminary written notice will be given.

(h) When the hearing involves medical issues, a medical assessment other than that of the person or persons involved in making the original decision will be obtained and made a part of the record if the hearing officer or the appellant considers it necessary.

(i) The claimant or his representative will have the opportunity

(1) to examine all documents and records used at the hearing;

(2) at his option, to present his case himself or with the aid of others, including legal counsel;

(3) to bring witnesses;

(4) to establish all pertinent facts and circumstances;

(5) to advance any arguments without undue interference; and

(6) to question or refute any testimony or evidence.

(j) Prompt, definitive, and final administrative action will be taken within 60 days from the date of the request for a fair hearing. The claimant will be notified of the decision, in writing, in the name of the State agency and, to the extent it is available to him, of his right to judicial review.

(k) When the hearing decision is favorable to the claimant, or when the agency decides in favor of the claimant prior to the hearing, the agency will make the corrected payments retroactively to the date the incorrect action was taken.

(l) The hearing officer's (or panel's) recommendations shall be based exclusively on evidence and other material introduced at the hearing. The verbatim transcript of testimony and exhibits, or an official report containing the substance of what transpired at the hearing, together with all papers and requests filed in the proceeding, and the hearing officer's or panel's recommendations, will constitute the exclusive record for decision by the hearing authority and will be available to the claimant at a place accessible to him or his representative at any reasonable time.

6300. *Criteria for the Administration of the Plans*

(a) The State agency establishes policies and procedures that carry out the purpose and provisions of this policy and that assure equity of treatment in relation to the laws and standards pertaining to assistance.

The State agency takes the necessary steps to see that there is uniformity in the application of agency policy in similar situations.

(b) A request for a hearing is considered as any clear expression (oral or written) by the claimant (or person acting for him, such as his legal representative, relative, or friend) to the effect that he wants an opportunity to present his case to higher authority. The freedom to make such a request is not limited or interfered with in any way, and agency emphasis will be on helping the claimant in submitting and processing his request, and in preparing his case, if needed.

(c) Opportunity for a fair hearing includes:

(1) Consideration of any action, or failure to act with reasonable promptness, on a claim for assistance which includes undue delay in reaching a decision on eligibility or in making a payment, refusal to consider a request for or undue delay in making an adjustment in payment, and suspension or discontinuance of assistance in whole or in part;

(2) Consideration of the agency's interpretation of the law, and the reasonableness and equitableness of the policies promulgated under the law, if the claimant is aggrieved by their application to his situation;

(3) Consideration of agency decisions regarding:

(i) Eligibility for assistance in both initial and subsequent determinations,

(ii) Amount of assistance or change in payments,

(iii) The manner or form of payments, including restricted or protective payments, even though no Federal financial participation is claimed, and

(iv) Conditions of payments, including work requirements.

(d) Provision is made for reasonable time in which to appeal agency action.

(e) Final administrative action is taken within the 60-day limit (IV-6200, item j), except that where the claimant requests a delay in the hearing in order to prepare his case or for other essential reasons, reasonable time is given and such extra time may be added to the 60 days.

(f) The agency does not deny or dismiss a request for a hearing except where it has been withdrawn by the claimant in writing or abandoned.

A request for a hearing is considered abandoned only if neither the claimant nor his representative appears at the time and place agreed upon for the hearing, and if within a reasonable time after the mailing of an inquiry as to whether he wishes any further action on his request for a hearing, no reply is received by either the local or State agency.

(g) The hearing authority may be the highest executive officer of the State agency, a panel of agency officials or a hearing officer appointed for that purpose, but no person who participated in the local decision

being appealed will participate in a final administrative decision on such case. The hearing authority is responsible for a final administrative decision in the name of the State agency on all issues that have been the subject of a hearing. The decision of the hearing authority is binding on the State and local agency. The State agency is responsible for seeing that the decision is carried out promptly.

Insofar as may be applicable, a decision in favor of the claimant applies retroactively to the date the incorrect action was taken, and also applies prospectively.

(h) The impartial official (or officials) of the State agency who is responsible for conducting the hearing has not been involved in any way with the action in question.

(i) The issuance of hearing procedures is in the form of rules and regulations, or in some other form in which they will be publicized.

(j) Written notification and, to the extent possible, oral explanation of the right to and procedure for requesting a fair hearing are given at the time of application. Written notice, and oral explanation as necessary, are given at the time of any agency action affecting the claim for assistance, including change in or termination of assistance.

(k) Individuals are informed of their right to be represented at fair hearings by others. At his option, the claimant may be represented by legal counsel or by a relative, friend or other spokesman, or may represent himself.

(l) The convenience of the claimant is considered in setting the date, time, and place for the hearing. Notice is given in writing with adequate preliminary information about the hearing procedure necessary for his preparation for the hearing and effective presentation of his case. He is advised as to the use of witnesses and legal counsel or other representative, as well as any procedure or financial provisions for ob-

taining legal representation, including availability of fees for legal counsel from the agency.

(m) When an assessment by a medical authority, other than the one involved in the decision under question, is requested by the claimant, it is obtained, at agency expense, from a medical source satisfactory to the claimant. The hearing officer can also consider the physician's report in the record or can request additional evidence. The assessment of such medical authorities will be reported in writing or by personal testimony as an expert witness for the hearing record.

(n) The claimant or his representative has adequate opportunity to examine material that will be introduced as evidence prior to the hearing as well as during the hearing, to give all the evidence on points at issue he believes necessary without undue interference, to ask for substantiation of any statements made by others, and to present evidence in rebuttal.

(o) Non-record or confidential information which the claimant does not have an opportunity to hear or see is not made a part of the hearing record or used in a decision on the appeal. The hearing officer does not review the case record, or other material prior to the hearing unless such material is made available to the claimant or his representative.

6400. *Interpretation*

(a) *Opportunity for a Fair Hearing*

Fair hearing procedures, including the conduct of the hearing, are designed to assure the right of every claimant to demand and obtain a fair hearing. The claimant's freedom to request a hearing, whenever he believes that proper consideration has not been given to all the circumstances surrounding his claim, is a fundamental right and is not to be limited or interfered with in any way.

Since, under the Federal act and the State plan, every aggrieved claimant is entitled to the opportunity for a hearing, only the claimant may withdraw his re-

quest for a hearing and this is to be in the form of a written withdrawal.

Effective complaint and adjustment procedures, whereby corrective action may be easily requested and readily taken without the need for a hearing, are necessary, when indicated. Advance opportunity afforded the recipient to respond to questions which could result in change of grant or termination is a significant part of such procedures. So is written, and whenever practical, oral information of the reasons for change, denial, or termination. This is particularly important where the agency decision is based on judgmental factors or eligibility requirements that entail evaluative decisions on the part of workers, as compared to decisions based on non-debatable facts (such as receipt of OASI, death, etc.). However, the State and local agency adjustment procedures cannot be allowed to interfere with the hearing process.

The claimant's right to a hearing includes the privilege of presenting his case in any way he desires. Some will wish to tell their story in their own way, some will desire to have a relative or friend present the evidence for them, and still others will want to be represented by legal counsel. In many instances the recipient's position can best be presented by an attorney. In order for the claimant to obtain an attorney, legal fees may need to be provided by the State. Federal financial participation is available in meeting the cost of these fees. States are urged to provide payment for the services of an attorney, or refer recipients to attorneys otherwise available in the community, because of the skill and knowledge of the legal profession in these matters. Furthermore, the claimant may bring any witnesses he desires to help him establish pertinent facts and to explain his circumstances.

The hearing is conducted in an informal rather than formal court-type procedure in order to serve the best interests of the claimant; however, the hearing is to be subject to the requirements of due process.

(b) *Publication of Hearing Procedures*

The publication of hearing procedures in the form of rules and regulations or a clearly stated pamphlet helps to emphasize the importance of the procedure. This material is useful to applicants and recipients or to others interested in their behalf. It contributes to the fairness of the hearing procedure, and emphasizes that there is "due process" in program administration affecting the right to public assistance.

(c) *Informing the Claimant of His Right to a Hearing*

Written notification of the right to a hearing may be on the application form and other forms routinely used by the agency which go to applicants and recipients, as well as an explanatory pamphlet distributed by the agency. Oral explanations should also be given regarding the policy on hearings at intake and at time of a change in eligibility.

The purpose of informing the claimant of his right to a hearing, in writing, and whenever practicable orally, is to assure that the claimant fully understands this right. This right is further assured by the agency explaining the right to a hearing in understandable terms and in being helpful as needed in the preparation for and conduct of the hearing.

(d) *Convenience of the Claimant Considered*

The agency has not discharged its responsibility for a hearing unless it has taken all steps necessary to enable a claimant who requested a hearing to attend the hearing in person or to be represented by a person of his own choosing. If the hearing is to be held at a considerable distance from the locality of the claimant's residence, it may be necessary to provide for the transportation and other costs of the claimant, his representative, and his witnesses.

Notice to claimant as to the hearing being scheduled in his behalf includes information about the fair hear-

ing as an informal administrative procedure, in which a dissatisfied claimant or his representative may present his grievance with the help of witnesses or legal representation to show why action or inaction in his case should be corrected by the State agency.

(e) *Impartiality of Official Conducting the Hearing*

The person conducting the hearing shall not have been connected in any way with previous actions or decisions on which the appeal is made. For example, a field supervisor who has advised the local agency in the handling of a case would be disqualified from acting as the hearing officer.

(f) *Impartiality of the Hearing Authority*

The hearing authority shall not have been directly connected with the agency action about which the claimant is appealing.

(h) *Opportunity to Examine the Official Record*

The record of the proceedings at the hearing, which constitute the official record, is to be made available to the claimant or his representative to examine, if he desires. If any additional material is made a part of the hearing record, this, too, would be made available.

(i) *Judicial Review*

In some States, the right of judicial review may be prescribed by statute specifically authorizing review of the agency decision on the basis of the record of administrative proceedings. In other States, even in the absence of statutory provisions, a claimant may be able to invoke the remedy of judicial review on the showing that the agency action was "unreasonable, arbitrary, or capricious." The content of the notice of decision, as regards judicial review, would depend upon the kind of remedy available in the State.

6500. *Federal Financial Participation*

Federal financial participation is available in:

(a) Payments made to carry out hearing decisions, or to take corrective action prior to the hearing, including corrected payments retroactively to the date the incorrect administrative action was taken.

(b) Payments of assistance continued pending a hearing decision.

(c) Administrative costs necessary for:

(1) Carrying out the hearing procedures;

(2) Providing transportation and other costs for the claimant, his representative and witnesses to and from the place of the hearing;

(3) Fees for legal counsel; and

(4) Other costs, expenditures, and fees reasonably related to the hearing, including expenses involved in obtaining an additional medical assessment.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 14

MAE WHEELER, et al.,
Appellants,

vs.

JOHN MONTGOMERY, Director of the STATE DEPARTMENT OF SOCIAL WELFARE, and RONALD BORN, General Manager of the SAN FRANCISCO CITY AND COUNTY DEPARTMENT OF SOCIAL SERVICES,
Appellees.

On Appeal from the United States District Court for the Northern District of California

Motion to Affirm

THOMAS C. LYNCH
Attorney General of the State of California

RICHARD L. MAYERS
Deputy Attorney General

ELIZABETH PALMER
Deputy Attorney General
6000 State Building
San Francisco, California 94102
Telephone: 557-0266

Attorneys for Appellees

THOMAS M. O'CONNOR
City Attorney City and County of San Francisco

RAYMOND D. WILLIAMSON, JR.
Deputy City Attorney

Of Counsel

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 634

MAE WHEELER, et al.,
Appellants,

vs.

JOHN MONTGOMERY, Director of the STATE DEPARTMENT OF SOCIAL WELFARE, and RONALD BORN, General Manager of the SAN FRANCISCO CITY AND COUNTY DEPARTMENT OF SOCIAL SERVICES,
Appellees.

On Appeal from the United States District Court for the Northern District of California

MOTION TO AFFIRM

Appellees in the above entitled case move to affirm on the ground that the questions presented are so unsubstantial as not to warrant further argument.

STATUTES INVOLVED

California Welfare & Institutions Code sections 12200 and 12201 and 10950-10965 the latter providing for a fair hearing before the Director of the State Department of Social Welfare are printed in Appendix D to the Jurisdictional Statement. Regulation 44-325.43 of the Public Social Serv-

ices Manual effective April 1, 1968 prescribing the notice and hearing to be held prior to suspension, withholding or termination of aid is printed in Appendix A attached hereto. Attached hereto as Appendix B are the provisions of the HEW Federal Handbook of Public Assistance Administration as revised February 8, 1968 and September 30, 1968 governing fair hearings.

QUESTION PRESENTED

The question presented and considered by the court below is whether State regulation PSS 44-325.43, effective April 1, 1968 provides recipients of public assistance grants with the minimum standards of due process required by the Constitution.*

Summary of the Regulations Governing Pre-Termination of Welfare Benefits.

This regulation provides that prior notice and hearing be accorded to all recipients of categorical aids when tentative determination has been made by the county to withhold, suspend or terminate aid. The notice shall include a statement setting forth the proposed action, the ground therefore and what information is needed from the recipient in order to determine eligibility or to determine the correct amount of a grant, together with a statement of the recipient's right to be heard and thereby represented by counsel† (or other authorized representative) with a repre-

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*Appellants phraseology of the "Questions Presented" is misleading. It erroneously assumes that the regulation does not provide adequate notice, that the regulation provides no hearing on the factual issues underlying the decision to cut off assistance, that the recipient is not given full information of all evidence that the county agency has regarding ineligibility, and that the conference consists of nothing more than an "interview" with a case worker. Jurisdictional Statement p. 3.

†Regulation 22-001.5 Operations Manual, California Department of Social Welfare.

sentative of the County Welfare Department to the end that a fair determination can be made and to resolve, if possible, the question of eligibility. The regulation requires that prior and full disclosure be made by the county of the information upon which its proposed action is based; the notice is to be given only if the county has evidence indicating probable ineligibility which evidence is both substantial in nature and reliable in source. PSS 44-325.421.

STATEMENT

Appellant Mrs. Wheeler, as of August 30, 1967, received monthly old age benefits (OAS) in the amount of $113.95. Appellees received information that Mrs. Wheeler had received some $6,000 in insurance proceeds and had transfered the money to her grandson. The County agency reached the conclusion that the transfer was made to avoid discontinuance of welfare benefits and determined that Mrs. Wheeler's action rendered her ineligible for continued benefits because she had had more money than the maximum permitted while maintaining eligibility.* Old age security benefits were withheld as of September 1, 1967, however appellant received in addition to her social security check of $44.60 per month, general assistance (county aid) in the amount of $53.90 per month,† and was eligible for medical care during the entire period should the need have arisen until December 1, 1967, when old age security payments were restored by virtue of a temporary restraining

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*$1200 cash California Welf. & Inst. Code., § 11154.

†General assistance is "welfare aid". Appellant's statement that she "received no welfare aid whatsoever during the months of September, October and November, 1967" is not an accurate statement and the allegation that she subsisted for three months solely on $44.30 monthly social security check does not conform to the facts. J.S. 5. General assistance includes county hospital care and vendor payments for rent, food and clothing.

order issued by the court below on December 6, 1967*. Full welfare benefits were immediately restored and never disrupted because eligibility was confirmed by the Director on January 12, 1968 following a fair hearing on December 22, 1967.

The District Court Judge entered a class action order concluding that the prerequisites of Fed. R. Civ. P. 23(a) and 23(b)(2) were met. However, the court denied several motions for intervention stating, "Since December 6, 1967, plaintiff's counsel has made motions for intervention and a motion for modification of the temporary restraining order to include the entire alleged class. The court deems the showings made with respect to persons other than Mrs. Wheeler, inadequate to warrant further injunctive relief at this time."†

The court finding that the provision of 42 U.S.C. § 2281 were satisfied, ordered the convening of a three-judge court. Appellee Montgomery, Director of the State Department of Social Welfare then promulgated Regulation PSS-44-325.43. The Court below found that the regulation affords minimum due process at the pre-termination conference and therefore dismissed this action.

THE CONSTITUTIONAL QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

I. Introduction

The basic thrust of the complaint as it was first filed by appellants was to raise the question of whether at least some hearing prior to the termination of Old Age Assistance pay-

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*Jurisdictional Statement, App. C. p. 14a.

†Jurisdictional Statement, App. B. p. 7a. Appellant's statement that the denial of motions to intervene were based on the ground that Mrs. Wheeler was an adequate representative of the class is not substantiated by the court's memorandum opinion. Jurisdictional Statement p. 5.

ments was constitutionally compelled. That claim was immediately conceded by appellees who promptly adopted a new regulation which provides to all public assistance recipients a written notice of the alleged grounds for ineligibility and a hearing prior to any determination of ineligibility for continued receipt of aid.*

Thus, the only issue which was presented and passed upon by the three-judge court below was whether the newly adopted regulation adequately affords due process protections to public assistance recipients. The court held the regulation to be constitutional. The court's examination of the constitutionality of the notice and hearing provisions contained in the newly adopted regulation was properly made in the light of the fact that (1) determinations as to the continued eligibility must be made promptly and no less often than once a month with respect to over one and one-quarter million public assistance recipients, and (2) the State of California provides recipients with the fair hearing process called for and required by both the Social Security Act and the provisions of state law (Welfare & Institutions Code §§ 10950-10965; the latter providing for judicial review.

Thus, it should be emphasized that the issue presented in this case is not whether a hearing prior to termination of aid is constitutionally required, appellees have conceded this constitutional requirement, but whether the hearing

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*Appellants refer to this regulation as providing only an "informal conference" Jurisdictional Statement pp. 10, 11, 12, 14, 15, 16 in the apparent belief that this label will render the regulation unconstitutional. Even the statutory fair hearing (adopted to conform to the requirements of the Social Security Act) "is conducted in an informal rather than formal court-type procedure in order to serve the best interests of the claimant, however, the hearing is to be subject to the requirements of due process." Sec. 6400(a) Federal Handbook of Public Assistance Administration App. B p. 13.

provided by the regulation meets those requirements. Appellants repeated references to the many cases in which the courts of this nation have recognized the due process requirements of a prior, timely and adequate hearing are irrelevant inasmuch as the basic principles enunciated by these cases have been fully recognized and accepted by appellees.* The court below determined that these principles have been properly implemented by appellees through the adoption of Regulation PSS-44-325.43.

II. What Is Due Process Depends on Circumstances.

What is due process is a flexible concept dependent on the particular circumstances.

"The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *"Cafeteria and Restaurant Workers etc. v. McElroy,* 367 U.S. 886, 895 (1961) 'Due process', unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Joint Anti-Fascist Comm. v. McGrath,* 341 U.S. 123, 162-163 (1951) (concurring opinion)

Thus it is important to place the notice and hearing procedure provided for in Regulation 44-325.43 in its correct factual and legal surroundings.

There are approximately 1,276,000 recipients of the various categorical aid programs† in California. County welfare departments are involved in making an enormous number of decisions daily respecting continued eligibility—and thus must develop a rapid method of fairly determining

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*Jurisdictional Statement pp. 8, 9, 10.

†Welfare programs partially financed by the federal government.

whether to suspend, terminate and withdraw public assistance grants to one and one-quarter million recipients. The number of determinations required and the need for an expeditious and fair review of these determinations are important factors in assessing the constitutional adequacy of the regulation.

In addition it must be recognized that following the informal hearing provided for by the regulation there is readily available to each aggrieved recipient the statutory fair hearing procedure* followed by a court review of that administrative decision.† The hearing provided by the regulation does not purport to and was never designed to be a substitute for or supplant the statutory fair hearing process. Thus, criticism of the regulatory hearing based upon the citation of cases dealing with federal or state full-scale trial type administrative actions taken pursuant to the Federal Administrative Procedure Act are quite inapposite. Appellants, for example, cite cases involving the type of record required by federal courts to review full scale elaborate and lengthy hearings by the Interstate Commerce Commission.‡ The implied effort to equate the kind of a record needed to review an I.C.C. hearing with the kind of problems here involved demonstrates a total misapprehension of the nature of the issues presented in this case. The due process requirements are different because the scale of the problems, the nature of the problem presented and the time needed for a resolution of the problems differ. The regulatory hearing provided by Reg. PSS-44-325.43 is plainly designed to reach a fair determination expeditiously.

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*California Welf. & Inst. Code §§ 10950 et seq.

†California Welf. & Inst. Code § 10962.

‡Jurisdictional Statement page 14.

It is in the interests of the recipient, as well as the government, that there be this expeditious and informal process.

Appellants respectfully suggest that the Reg. 44-325.43 provides due process protections far superior to those found to be constitutionally adequate in *Knight v. State Board of Education,* 200 F. Supp. 174, 178 (M.D.Tenn. 1961) and *Dixon v. Alabama State Board of Education,* 294 F. 2d 150 (5th Cir. 1961) *cert. den.* 368 U.S. 930;

It should be noted that these relief allowances are not pensions nor are they intended to be paid on a long time basis once eligibility for the first month is established. They are intended to relieve need while that need exists and no longer than it continues to exist. To require continued payment during the pendency of a trial type administrative hearing and until possible judicial review becomes final is to pervert the purpose and objective of this legislation.

The regulation gives the recipient reasonable notice and opportunity to ascertain the evidence pointing to ineligibility and to point to weaknesses or countervailing evidence. If there is still disagreement the recipient is still entitled to a judicial type hearing.

III. HEW's Fair Hearing Requirement.

Appellants' correctly state, page 16, Jurisdictional Statement,

> "Under HEW regulations every state welfare plan must contain certain provisions for a fair hearing: review of local determination by an impartial official of the state welfare department; complete and effective notice; the decision to be based solely on the evidence adduced at the hearing; adequate time for discovery and inspection; opportunity to question or refute testimony or evidence and a prompt decision."

Appellees do not dispute the fact that California provides all of this. Appellants, however, proceed to the following non-sequitor, "There is nothing in the HEW regulations which requires the fair hearing to be held after termination of assistance."

The answer in brief is that there is nothing in the HEW regulations which requires the fair hearing to be held before termination of assistance.*

IV. The Pre-termination of Aid Hearing Meets Due Process Requirements for Suspension or Withholding of Welfare Benefits.

Appellants assert various grounds for contending that the regulation does not meet minimum due process standards. Before discussing these various points, it should be made clear that even when due process requires a trial type of hearing, the relaxation of one or more attributes of such a hearing has been permitted. *U.S. v. Nugent,* 346 U.S. 1 (1953); *Norwegian Nitrogen Co. v. U.S.,* 288 U.S. 294 (1933); *Elder v. U.S.,* 202 Fed. 2d 465, (9th Cir. 1953); *cf. Williams v. New York,* 337 U.S. 241 (1949)

A. Appellants' first attack on the regulation is that the county agency acts as judge, jury and prosecutor. This time-worn attack on administrative agency hearings repeatedly has been rejected by the courts.

Even in full-scale adjudicatory hearings, it has been held without equivocation that it is not improper for an agency to sit in judgment of cases brought as a result of investigation by its own investigators and presentation by its own legal staff before an employee of the agency in face of the charge it acts as "judge, jury and prosecutor". *Marcello v. Bonds,* 349 U.S. 302, 311 (1955); *Federal Trade Comm'n. v. Cement Institute,* 333 U.S. 683, 700-703 (1948) *Pangburn v.*

*Withdrawal of Public Welfare: The Right to a Prior Hearing, 76 Yale L.J. 1234, 1236 f. 10 (1967)

C.A.B., 311 Fed. 2d 349, 356 (1st Cir. 1962); *Holt v. Raleigh City Board of Education*, 265 Fed. 2d 95, 98 (2d Cir. 1959) *cert. den.* 361 U.S. 818.

B. Appellants' second attack on the regulation is directed to the timeliness of the notice. But under the circumstances it is reasonable and timely.

The regulation provides that the recipient shall be notified in writing "immediately upon an initial decision being made". Written notice is required to be given *in no case less than* three mail delivery days prior to the usual delivery date of the warrant. Concern that the notice be delivered is underlined by the requirement that "the county shall give such notice as it has reason to believe will be effective including, if necessary, a home call by appropriate personnel."* The contents of the notice are set forth in the regulation, are discussed supra, and need not be repeated here.

The regulation provides that upon receipt of such notice the recipient (and his authorized representative, e.g. an attorney should he choose†) may meet with his case worker, an eligibility worker, or another responsible person in the county department, at a specified time and place or during a given time period which shall not be more than three days. The last day on which a hearing must be held is obviously one day prior to the usual delivery date of the warrant. The fact that this deadline is provided does not mean that the hearing may not be held, should the recipient so desire it, prior thereto. The fact that the last day for a conference is but a day prior to the usual date of a delivery of a warrant is designed to accommodate the needs of the recipient rather than the county.

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*PSS-44-325.43.

†Regulation 22-001.5 California Department of Social Welfare Operations Manual.

Notice of charges of student misconduct received 2 days before the disciplinary hearing was held to be adequate and timely by the court in *Jones v. State Board of Education,* 279 F. Supp. 190, 199 (M.D. Tenn. 1968). The court in *Jones* pointed out that in *Due v. Florida A. & M. University,* 233 F. Supp. 396 (N.D. Fla. 1963) "a letter was read to the students for the first time at the hearing stating the charge against them. This was the only notice of the charge that the plaintiffs were afforded, yet the court held the notice to be both adequate and timely."

C. Burden of proof is unchanged by the regulation.

Appellants next assert that the regulation places the burden of proof on the recipient to "re-establish eligibility" at the hearing. The phrase "re-establish eligibility" cannot properly be interpreted as constituting an effort to shift the formal and legal concept of burden of proof. A realistic assessment of the process will make it apparent that by the time the county has sent the notice it has made an initial but still tentative determination to withhold an aid payment.

The Federal District Court in *Jones,* 279 Fed. Supp. at 202, disposed of the same contention by stating, "This phase of the plaintiffs' argument resolves itself basically into an unfounded argument of semantics brought about by the use of the word 'readmit' by the F.A.C."

The regulation itself speaks of giving the notice "immediately upon the initial decision being made to withhold" and the same regulation talks of the need to provide such notice of an initial decision to withhold "when further investigation is necessary to determine continuing eligibility." This is further underlined by the language that aid payments may not be withheld unless the county has evidence "which is both substantial in nature and reliable in source

indicating probable ineligibility." This language should be compared to the notice requirements of *Thorpe v. Housing Authority,* 386 U.S. 670 and *Dixon.*

D. Appellants' demands for a full record, court reporter, findings of fact, and discovery go completely beyond due process requirements and call for a premature judicial type review.

Although never once alluded to in the briefs or arguments presented to the court below, appellants now casually "up the ante" by including in the procedures they assert are constitutionally required a demand for a court reporter*, written findings of fact and conclusions of law and opportunity for discovery. There is no more merit to these demands than there is to appellants' initial contention that a formal record need be made of the evidence adduced at the hearing provided for in the regulation.

In *Due v. Florida A. & M. University,* 233 F. Supp. 396, 403 (1963), the court held due process was satisfied in that:

> "There was notice to each of these plaintiffs, the charge was made explicit, and each was afforded full opportunity to be heard, and, in fact, was heard to the point where each said he had nothing more to say.
>
> "A fair reading of the Dixon case shows that it is not necessary to due process requirements that a full scale judicial trial be conducted by a university disciplinary committee with qualified attorneys either present or formally waived as in a felonious charge under the criminal law. There need be no stenographic or mechanical recording of the proceedings."

No useful purpose would be served by making such a record since it is clear that no administrative or judicial review is contemplated. The statutory fair hearing is not an appellate

*The fair hearing procedure under Welf. & Inst. Code sec. 11950 et seq. is mechanically transcribed; no court reporter is furnished. California Welf. & Inst. Code § 10956.

proceeding, it is a de novo hearing, the record of which is subject to judicial review. Neither *Dixon* nor *Thorpe* hint that a record of the administrative conference is required.

E. Confrontation and cross-examination are not essential to "due process" at the time of and under the circumstances of these proceedings.

Appellants' final ground for asserting that the regulation is constitutionally deficient is the failure to afford the recipient the right "to confront and cross-examine". This alleged defect is also without merit. The court in *Dixon* expressly rejected the right to cross-examine witnesses (294 F.2d at 159). Obviously, the housing authority-tenant informal conference in *Thorpe* made no provision for confrontation and cross-examination. Nor was such condition considered essential in *Knight v. State Board of Education,* 200 F. Supp. 174, 178 (1961). In *Knight* the court concluded that "the rudiments of fair play and the requirements of due process vested in the plaintiffs [suspended students] the right to be forewarned or advised of the charges to be made against them and to be afforded an opportunity to present their side of the case."

In *Londoner v. Denver,* 210 U.S. 373, 386 (1908), cited by appellants for the proposition that hearings must be timely and adequate* concerned the right of a tax payer to be heard before a tax became irrevocably fixed, this Court held "[He] who is entitled to it [a hearing] shall have the right to support his allegations by argument however brief, and, if need be, by proof however informal." This is precisely what the regulation affords appellants.

V. Thorpe and Dixon Do Not Sustain Appellants' Position

Appellants place primary reliance on *Thorpe v. Housing Authority of the City of Durham,* cert. granted 385 U.S.

*Jurisdictional Statement p. 8.

967, remanded 386 U.S. 670, cert. granted 390 U.S. 940. They state that "The question here is substantially the same as in *Thorpe* . . ."* The three judge court was well aware of the litigation in *Thorpe* and that when this Court scheduled the matter for reargumnt it confined its concern to the question of the retroactivity of the Housing Authority regulation. It is thus fair to state that implicit in this court's action in *Thorpe* was an acceptance by it of the constitutional adequacy of the notice and hearing provisions accorded by the Housing Authority to housing authority tenants.

In *Thorpe* this Court plainly indicated that the constitutional requirements of due process would be met if a housing authority tenant, when given a notice to vacate, was given the specific reasons therefor—including a detailed statement of the tenant's action which resulted in the determination that eviction should be instituted and an opportunity "in a private conference or other appropriate manner" at which the tenant is told "the reason for the eviction and given an opportunity to make such reply or explanation as he may wish." HUD circular February 7, 1967. The North Carolina Supreme Court, in affirming its original decision after remand (157 S.E. 2d at 147), held that the procedure developed by the Federal Housing Authority did not apply retroactively.

Petitioner in *Thorpe* did not contend that due process required more than that the housing authority tenant "be given a fair opportunity to be heard to contest the authority's action . . ."†

All that petitioner Thorpe urged was that the housing authority circular "should be interpreted so as to include the right to be heard in person or by counsel at a hearing

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*Jurisdictional Statement page 7.

†Brief for Petitioner p. 13 No. 1003 October Term 1967.

or conference and also to include fair opportunities to challenge the grounds of the local authority's proposed action, to probe the facts relied upon by the authority, and to present the tenant's own version of the facts. The circular should also be interpreted to include the requirement that the authority's decision be premised on the facts presented to it."* *All of these things are* not only implicit but *explicit* in the regulation adopted by appellees.

The notice and hearing procedures adopted by the State of California appellees provide due process procedures immeasureably superior to those found, or implicitly assumed to be, constitutionally adequate by the Fifth Circuit Court in *Dixon v. Alabama State Board of Education,* 294 F. 2d 150 cert. den., 368 U.S. 930.

In developing the guide lines in *Dixon* the court had fewer problems to resolve than did the appellees in developing the regulation. The court in *Dixon* did not have to provide a process that would involve 1,276,000 individuals (i.e., the number of welfare recipients in California) nor the number of decisions necessarily involving those individuals. Nor did the procedure outlined by the *Dixon* court have to fulfill the need for as an expeditious resolution of the problems as are needed in handling over 1¼ million welfare recipients.

Yet with fewer cases and more time available the Circuit Court in *Dixon* laid down guide lines far less onerous than are required by the state regulation. To denominate this regulation as providing "only for an informal conference with caseworker personnel of the county department" as appellants do† is to unduly minimize the due process protections afforded by the regulations.

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*Id. p. 15.

†Jurisdictional Statement p. 1.

The procedures provided for by the regulations are a far cry from the ex parte and arbitrary action claimed by appellants. The regulation requires far more than the pre-eviction procedure passed upon in *Thorpe* and the informal interview with an administrative authority standard set in *Dixon*. It provides a due process hearing fully attuned to the circumstances. It provides a hearing at which a fair determination can be made and thus is the essence of due process.

CONCLUSION

For the above reasons, appellees move that the order of the three judge district court dismissing this action be affirmed.

Dated: November 22, 1968

Respectfully submitted,

THOMAS C. LYNCH
Attorney General of the State of California

RICHARD L. MAYERS
Deputy Attorney General

ELIZABETH PALMER
Deputy Attorney General
6000 State Building
San Francisco, California 94102
Telephone: 557-0266

Counsel for Appellees

THOMAS M. O'CONNOR
City Attorney City and County of San Francisco

RAYMOND D. WILLIAMSON, JR.
Deputy City Attorney

Of Counsel

(Appendices Follow)

44-325 CHANGES IN AMOUNT OF PAYMENT (Continued)

.43 *Notification to Recipient When Aid Payment Is Withheld*

The recipient, the parent or other person responsible for the child in *AFDC*, shall be notified, in writing, immediately upon the initial decision being made to withhold a warrant beyond its usual delivery date for any reason other than death, and in no case less than three (3) mail delivery days prior to the usual delivery date of the warrant to the recipient. The county shall give such notice as it has reason to believe will be effective including, if necessary, a home call by appropriate personnel. Form ABCD 239, Notice of Action, or a substitute form, may be used for this purpose. Every notification shall include:

.431 A statement setting forth the proposed action and the grounds therefor, together with what information, if any, is needed or action required to reestablish eligibility or to determine a correct grant.

.432 Assurance that prompt investigation is being made; that the withheld warrant will be delivered as soon as there is eligibility to receive it; and that the evidence or other information which brought about the witholding action will be freely discussed with the recipient, parent, or other person, if he so desires (see Section .434 below).

.433 A statement of whether, if aid is withheld, the recipient will or will not continue to be certified

for medical assistance during the month aid is withheld.

.434 A statement that the recipient, parent, or other person may have the opportunity to meet with his caseworker, an eligibility worker, or another responsible person in the county department, at a specified time, or during a given time period which shall not exceed three (3) working days, and the last day of which shall be at least one (1) day prior to the usual delivery date of the warrant, and at a place specifically designated in order to enable the recipient, parent, or other person:

(a) To learn the nature and extent of the information on which the withholding action is based;

(b) To provide any explanation or information, including, but not limited to that described in the notification pursuant to Section .431 above;

(c) To discuss the entire matter informally for purposes of clarification and, where possible, resolution.

Appendix B

H.T. No. 140

HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION

Part IV Eligibility, Assistance, and Services

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6000-6999 Fair Hearings 2/8/68

6000. *Fair Hearings*

6100. *Provisions of the Act*

(a) Sections 2(a)(4), 402(a)(4), 1002(a)(4), 1402(a)(4), and 1602(a)(4) read as follows:

"A state plan . . . must . . .

"provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for . . . [aid or assistance under the plan] is defined or is not acted upon with reasonable promptness."

(b) Sections 6(a)(5), 406(b)(2)(E), 1006(5), 1405(5), and 1605(a)(E) authorize Federal financial participation in protective payments "but only with respect to a State whose State plan . . . includes provision for . . .

"opportunity for a fair hearing before the State agency on the determination . . . [or need for protective payment] for any individual with respect to whom it is made."

6200. *Requirements for State Plans*

A State plan for OAA, AFDC, AB, APTD, or AABD must provide that:

(a) The State agency will be responsible for fulfillment of fair hearings provisions, and shall specify the hearing authority.

(b) An opportunity for a fair hearing before the State agency will be granted to any individual requesting a hearing because his claim for assistance is denied, is not acted upon with reasonable promptness, or because he is aggrieved by any other agency action affecting his receipt or termination of assistance, or by agency policy as it affects his situation.

(c) Decisions by the hearing authority, rendered in the name of the State agency, will be binding on

the State and local agency. The State agency will establish and maintain a method for informing, at least in summary form, all local agencies of all fair hearing decisions by the hearing authority, and the decisions will be accessible to the claimants, their representatives, and the public (subject to provisions relating to safeguarding public assistance information).

(d) The hearings will be conducted by an impartial authority (or officials) of the State agency.

(e) Hearing procedures will be issued and publicized by the State agency for the guidance of all concerned.

(f) Every claimant will be informed in writing at the time of application and at the time of any agency action affecting his claim
  (1) of his right to a fair hearing;
  (2) of the method by which he may obtain a hearing;
  (3) that he may be represented by others including legal counsel; and
  (4) of any provision for payment of legal fees by the agency.

(g) The hearing will be conducted at a time, date, and place convenient to the claimant, and adequate preliminary written notice will be given.

(h) When the hearing involves medical issues, a medical assessment other than that of the person or persons involved in making the original decision will be obtained and made a part of the record if the hearing officer or the appellant considers it necessary.

(i) The claimant or his representative will have the opportunity

(1) to examine all documents and records used at the hearing;

(2) at his option, to present his case himself or with the aid of others, including legal counsel;

(3) to bring witnesses;

(4) to establish all pertinent facts and circumstances;

(5) to advance any arguments without undue interference; and

(6) to question or refute any testimony or evidence.

(j) Prompt, definitive, and final administrative action will be taken within 60 days from the date of the request for a fair hearing. The claimant will be notified of the decision, in writing, in the name of the State agency and, to the extent it is available to him, of his right to judicial review.

(k) When the hearing decision is favorable to the claimant, or when the agency decides in favor of the claimant prior to the hearing, the agency will make the corrected payments retroactively to the date the incorrect action was taken.

(l) The hearing officer's (or panel's) recommendation shall be based exclusively on evidence and other material introduced at the hearing. The verbatim transcript of testimony and exhibits, or an official report containing the substance of what transpired at the hearing, together with all papers and requests filed in the proceeding, and the hearing officer's or panel's recommendations,

will constitute the exclusive record for decision by the hearing authority and will be available to the claimant at a place accessible to him or his representative at any reasonable time.

6300. *Criteria for the Administration of the Plans*

(a) The State agency establishes policies and procedures that carry out the purpose and provisions of this policy and that assure equity of treatment in relation to the laws and standards pertaining to assistance.

The State agency takes the necessary steps to see that there is uniformity in the application of agency policy in similar situations.

(b) A request for a hearing is considered as any clear expression (oral or written) by the claimant (or person acting for him, such as his legal representative, relative, or friend) to the effect that he wants an opportunity to present his case to higher authority. The freedom to make such a request is not limited or interfered with in any way, and agency emphasis will be on helping the claimant in submitting and processing his request, and in preparing his case, if needed.

(c) Opportunity for a fair hearing includes:

(1) Consideration of any action, or failure to act with reasonable promptness, on a claim for assistance which includes undue delay in reaching a decision on eligibility or in making a payment, refusal to consider a request for or undue delay in making an adjustment in payment, and suspension or

discontinuance of assistance in whole or in part;

(2) Consideration of the agency's interpretation of the law, and the reasonableness and equitableness of the policies promulgated under the law, if the claimant is aggrieved by their application to his situation;

(3) Consideration of agency decisions regarding:

(i) Eligibility for assistance in both initial and subsequent determinations,

(ii) Amount of assistance or change in payments,

(iii) The manner or form of payments, including restricted or protective payments, even though no Federal financial participation is claimed, and

(iv) Conditions of payments, including work requirements.

(d) Provision is made for reasonable time in which to appeal agency action.

(e) Final administrative action is taken within the 60-day limit (IV-6200, item j), except that where the claimant requests a delay in the hearing in order to prepare his case or for other essential reasons, reasonable time is given and such extra time may be added to the 60 days.

(f) The agency does not deny or dismiss a request for a hearing except where it has been withdrawn by the claimant in writing or abandoned. A request for a hearing is considered abandoned only if neither the claimant nor his representa-

tive appears at the time and place agreed upon for the hearing, and if within a reasonable time after the mailing of an inquiry as to whether he wishes any further action on his request for a hearing, no reply is received by either the local or State agency.

(g) The hearing authority may be the highest executive officer of the State agency, a panel of agency officials or a hearing officer appointed for that purpose, but no person who participated in the local decision being appealed will participate in a final administrative decision on such case. The hearing authority is responsible for a final administrative decision in the name of the State agency on all issues that have been the subject of a hearing. The decision of the hearing authority is binding on the State and local agency. The State agency is responsible for seeing that the decision is carried out promptly.

Insofar as may be applicable, a decision in favor of the claimant applies retroactively to the date the incorrect action was taken, and also applies prospectively.

(h) The impartial official (or officials) of the State agency who is responsible for conducting the hearing has not been involved in any way with the action in question.

(i) The issuance of hearing procedures is in the form of rules and regulations, or in some other form in which they will be publicized.

(j) Written notification and, to the extent possible, oral explanation of the right to and procedure

for requesting a fair hearing are given at the time of application. Written notice, and oral explanation as necessary, are given at the time of any agency action affecting the claim for assistance, including change in or termination of assistance.

(k) Individuals are informed of their right to be represented at fair hearings by others. At his option, the claimant may be represented by legal counsel or by a relative, friend or other spokesman, or may represent himself.

(l) The convenience of the claimant is considered in setting the date, time, and place for the hearing. Notice is given in writing with adequate preliminary information about the hearing procedure necessary for his preparation for the hearing and effective presentation of his case. He is advised as to the use of witnesses and legal counsel or other representative, as well as any procedure or financial provisions for obtaining legal representation, including availability of fees for legal counsel from the agency.

(m) When an assessment by a medical authority, other than the one involved in the decision under question, is requested by the claimant, it is obtained, at agency expense, from a medical source satisfactory to the claimant. The hearing officer can also consider the physican's report in the record or can request additional evidence. The assessment of such medical authorities will be reported in writing or by personal testimony as an expert witness for the hearing record.

(n) The claimant or his representative has adequate opportunity to examine material that will be introduced as evidence prior to the hearing as well as during the hearing, to give all the evidence on points at issue he believes necessary without undue interference, to ask for substantiation of any statements made by others, and to present evidence in rebuttal.

(o) Non-record or confidential information which the claimant does not have an opportunity to hear or see is not made a part of the hearing record or used in a decision on the appeal. The hearing officer does not review the case record, or other material prior to the hearing unless such material is made available to the claimant or his representative.

6400. *Interpretation*

(a) *Opportunity for a Fair Hearing*

Fair hearing procedures, including the conduct of the hearing, are designed to assure the right of every claimant to demand and obtain a fair hearing. The claimant's freedom to request a hearing, whenever he believes that proper consideration has not been given to all the circumstances surrounding his claim, is a fundamental right and is not to be limited or interfered with in any way.

Since, under the Federal act and the State plan, every aggrieved claimant is entitled to the opportunity for a hearing, only the claimant may withdraw his request for a hearing and this is to be in the form of a written withdrawal.

Effective complaint and adjustment procedures, whereby corrective action may be easily requested and readily taken without the need for a hearing, are necessary, when indicated. Advance opportunity afforded the recipient to respond to questions which could result in change of grant or termination is a significant part of such procedures. So is written, and whenever practical, oral information of the reasons for change, denial, or termination. This is particularly important where the agency decision is based on judgmental factors or eligibility requirements that entail evaluative decisions on the part of workers, as compared to decisions based on non-debatable facts (such as receipt of OASI, death, etc.). However, the State and local agency adjustment procedures cannot be allowed to interfere with the hearing process.

The claimant's right to a hearing includes the privilege of presenting his case in any way he desires. Some will wish to tell their story in their own way, some will desire to have a relative or friend present the evidence for them, and still others will want to be represented by legal counsel. In many instances the recipient's position can best be presented by an attorney. In order for the claimant to obtain an attorney, legal fees may need to be provided by the State. Federal financial participation is available in meeting the cost of these fees. States are urged to provide payment for the services of an attorney, or refer recipients to attorneys otherwise available in the community, because of the

skill and knowledge of the legal profession in these matters. Furthermore, the claimant may bring any witnesses he desires to help him establish pertinent facts and to explain his circumstances.

The hearing is conducted in an informal rather than formal court-type procedure in order to serve the best interests of the claimant; however, the hearing is to be subject to the requirements of due process.

(b) *Publication of Hearing Procedures*

The publication of hearing procedures in the form of rules and regulations or a clearly stated pamphlet helps to emphasize the importance of the procedure. This material is useful to applicants and recipients or to others interested in their behalf. It contributes to the fairness of the hearing procedure, and emphasizes that there is "due process" in program administration affecting the right to public assistance.

(c) *Informing the Claimant of His Right to a Hearing*

Written notification of the right to a hearing may be on the application form and other forms routinely used by the agency which go to applicants and recipients, as well as an explanatory pamphlet distributed by the agency. Oral explanations should also be given regarding the policy on hearings at intake and at time of a change in eligibility.

The purpose of informing the claimant of his right to a hearing, in writing, and whenever practicable orally, is to assure that the claimant

fully understands this right. This right is further assured by the agency explaining the right to a hearing in understandable terms and in being helpful as needed in the preparation for and conduct of the hearing.

(d) *Convenience of the Claimant Considered*
The agency has not discharged its responsibility for a hearing unless it has taken all steps necessary to enable a claimant who requested a hearing to attend the hearing in person or to be represented by a person of his own choosing. If the hearing is to be held at a considerable distance from the locality of the claimant's residence, it may be necessary to provide for the transportation and other costs of the claimant, his representative, and his witnesses.

Notice to claimant as to the hearing being scheduled in his behalf includes information about the fair hearing as an informal administrative procedure, in which a dissatisfied claimant or his representative may present his grievance with the help of witnesses or legal representation to show why action or inaction in his case should be corrected by the State agency.

(e) *Impartiality of Official Conducting the Hearing*
The person conducting the hearing shall not have been connected in any way with previous actions or decisions on which the appeal is made. For example, a field supervisor who has advised the local agency in the handling of a case would be disqualified from acting as the hearing officer.

(f) *Impartiality of the Hearing Authority*

The hearing authority shall not have been directly connected with the agency action about which the claimant is appealing. For example, a State board member who has participated as a county board member or in another capacity in the local action on a case would disqualify himself from rendering a final decision on the particular case. This does not preclude the State director or administrative board from signing the decision in the name of the State agency, even though previously involved in the case.

(g) *Prompt, Definitive, and Final Action*

The hearing authority is responsible for rendering a conclusive decision. When the hearing authority is different from the hearing officer, such authority may adopt the recommendations of the hearing officer, or reject them and reach different conclusions on the basis of the evidence at hand, or refer the matter back to the hearing officer for a continuation of the hearing, because the materials submitted are insufficient to serve as the basis for a decision.

The State agency is responsible for assuring that the decision is carried out. Various methods, such as a report by the local unit to the State agency of action taken to carry out the hearing decision or follow-up by the State office staff, may be used. Remanding the case to the local unit for further consideration is not a substitute for "definitive and final administrative action."

The requirement for prompt, definitive, and final administrative action means that all requests for a hearing are to receive immediate attention and will be carried through all the steps necessary to completion. The requirement is not met if the State agency dismisses such requests for any reason other than withdrawal or abandoment of the request by the claimant.

The over-all time limit of 60 days between the date of the request for the hearing and the date of the final administrative action, will serve as one of the safeguards of prompt, administrative action. Detailed controls of individual steps in the hearing process, such as: time limits for accepting, forwarding, and acknowledging a request for a hearing, notice to the claimant, and date of the hearing will facilitate proper administration of the hearing process.

(h) *Opportunity to Examine the Official Record*
The record of the proceedings at the hearing, which constitutes the official record, is to be made available to the claimant or his representative to examine, if he desires. If any additional material is made a part of the hearing record, this, too, would be made available.

(i) *Judicial Review*
In some States, the right of judicial review may be prescribed by statute specifically authorizing review of the agency decision on the basis of the record of administrative proceedings. In other States, even in the absence of statutory provisions, a claimant may be able to invoke

the remedy of judicial review on the showing that the agency action was "unreasonable, arbitrary, or capricious." The content of the notice of decision, as regards judicial review, would depend upon the kind of remedy available in the State.

6500. *Federal Financial Participation*

Federal financial participation is available in:

(a) Payments made to carry out hearing decisions, or to take corrective action prior to the hearing, including corrected payments retroactively to the date the incorrect administrative action was taken.

(b) Payments of assistance continued pending a hearing decision.

(c) Payments of assistance within the scope of the federally aided public assistance programs made in accordance with a court order.

(d) Administrative costs necessary for:

(1) Carrying out the hearing procedures;

(2) Providing transportation and other costs for the claimant, his representative and witnesses to and from the place of the hearing;

(3) Fees for legal counsel; and

(4) Other costs, expenditures, and fees reasonably related to the hearing, including expenses involved in obtaining an additional medical assessment.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 14

MAE WHEELER, *et al.*,

Appellants,

—v.—

JOHN MONTGOMERY, Director of the State Department of Social Welfare, and RONALD BORN, General Manager of the San Francisco City and County Department of Social Services,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF *AMICI CURIAE* OF THE COLUMBIA CENTER ON SOCIAL WELFARE POLICY AND LAW, ROGER BALDWIN FOUNDATION OF THE AMERICAN CIVIL LIBERTIES UNION, MOBILIZATION FOR YOUTH, WILLIAMSBURG NEIGHBORHOOD LEGAL SERVICES, MORRISANIA NEIGHBORHOOD LEGAL SERVICES, AND LEGAL AID SOCIETY OF NEW YORK

LEE A. ALBERT
PAUL DODYK
HENRY A. FREEDMAN
401 West 117 Street
New York, New York 10027

Attorneys for the Columbia Center on Social Welfare Policy and Law

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 634

MAE WHEELER, *et al.*,

Appellants,

—v.—

JOHN MONTGOMERY, Director of the State Department of Social Welfare, and RONALD BORN, General Manager of the San Francisco City and County Department of Social Services,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF *AMICI CURIAE* OF THE COLUMBIA CENTER ON SOCIAL WELFARE POLICY AND LAW, ROGER BALDWIN FOUNDATION OF THE AMERICAN CIVIL LIBERTIES UNION, MOBILIZATION FOR YOUTH, WILLIAMSBURG NEIGHBORHOOD LEGAL SERVICES, MORRISANIA NEIGHBORHOOD LEGAL SERVICES, AND LEGAL AID SOCIETY OF NEW YORK

Interest of *Amici Curiae*

The Center on Social Welfare Policy and Law is the welfare law resource of the Legal Services Program of the Office of Economic Opportunity. Affiliated with the schools of law and social work at Columbia University, the Center undertakes research pertaining to the legal rights of wel-

fare beneficiaries and supports OEO-funded legal services programs and other legal organizations in the preparation of important litigation. The Center has submitted briefs to this Court in the cases concerning welfare residence requirements, substitute father rules, and eviction from public housing without a hearing.

The Center has rendered substantial assistance in cases around the country challenging the timeliness and adequacy of the procedures used for termination of the public assistance grant. It has coordinated the efforts of the groups described below in *Kelly* v. *Wyman*, which is the recently decided challenge to the hearing procedures for termination brought by twenty plaintiffs receiving public assistance in New York under the federally supported Aid to Families with Dependent Children (AFDC) and locally financed Home Relief programs. This Amicus brief in support of the Jurisdictional Statement in *Wheeler* v. *Montgomery* is prompted by the decision of the three-judge panel in New York, filed on November 26, 1968, submitted herein as Appendix A, which upholds the plaintiffs' claim under the Due Process Clause of the Fourteenth Amendment and is substantially at odds with the decision in *Wheeler*.

The Roger Baldwin Foundation of the American Civil Liberties Union is a non-profit organization devoted to the furtherance of civil liberties and civil rights in all aspects of American life. The transformation of constitutional guarantees of free speech, rational classification, and procedural due process into meaningful protection to needy persons dependent upon the State for their support has been a particular concern of the Foundation and led to its participation in the preparation of *Kelly* v. *Wyman*.

Mobilization for Youth, Williamsburg and Morrisania Neighborhood Legal Services, and the Legal Aid Society are supported by public funds (and, in the case of Legal Aid, private funds) and provide, together with other neighborhood legal services in New York City, virtually all of the legal representation to applicants for and recipients of public assistance.

Attorneys from the above organizations represent the plaintiffs in *Kelly* v. *Wyman,* which was an outgrowth of continuous efforts by attorneys for welfare recipients to deal with the numerous and daily instances of abrupt termination of benefits without notice of the reasons and without an opportunity to be heard. As the situations of the plaintiffs in *Kelly* depict, such attempts by counsel in *Kelly* to ascertain the reasons informally, to stave off evictions, to obtain emergency assistance, find housing and secure private charitable support to ameliorate the drastic consequences of erroneous termination were too often without avail. The extensive experience of these organizations was pooled with data collected by the Columbia Center on the extent and effects of wrongful termination to afford the court in *Kelly* a full and convincing record for resolution of the constitutional question.

Based on this record, the statutory three-judge panel in New York, Judges Feinberg, Bryan and McLean, unanimously ruled that the New York prior review mechanism, adopted after suit was brought, denied welfare recipients due process of law and enjoined termination of benefits without a prior hearing affording specified minimal requirements of due process. In an exhaustive opinion Judge Feinberg articulated for the court the factors bearing upon the constitutional requirement that a hearing before an

impartial official must be prior to termination and must afford disclosure of the evidence and its sources and opportunity to confront and cross-examine such sources. As the opinion in *Kelly* reflects, the record leaves no room for speculation about the crucial factors bearing upon this constitutional question, such as the vast area of discretionary judgments involved, the nature of the factual evidence relied upon, the impenetrable vagueness of the reasons told recipients, the timing of hearings held after termination, the percentage of reversals in such hearings, the impact of cut-off and delay, and so on.

Wheeler v. *Montgomery* and *Kelly* v. *Wyman* are the only two welfare prior hearing cases to have reached a decision before three-judge federal courts. This Court will readily appreciate that the parties in *Kelly* have a vital interest in the *Wheeler* case now on appeal before this Court. Accordingly, this brief is submitted to inform the Court of the recent decision in *Kelly* and the factors bearing upon that decision, factors not fully reflected in the cursory opinion in *Wheeler*. Moreover, the plaintiffs in *Kelly* receive benefits under the federally financed AFDC and locally funded Home Relief programs rather than federally financed Aid to the Aged; the termination issues in these programs may differ somewhat and the Home Relief program is not affected by the Social Security Act and HEW regulations thereunder.* Since this Court may in

* The Department of Health, Education and Welfare has proposed a regulation requiring continuation of assistance payments during the pendency of the statutory "fair hearing" in some, but not all, cases of termination under the federal categorical assistance programs. Said regulation is submitted herein as Appendix B. Requiring continuation only where the State or local welfare department decides initially that there is a genuine dispute of fact or judgment about an individual, the regulation is not coextensive with the decision in *Kelly*. Moreover, it has no bearing upon the Home Relief plaintiffs in *Kelly*.

its discretion be disposed to hear *Wheeler* v. *Montgomery* and *Kelly* v. *Wyman* on their merits together, as was done in the welfare residency cases, we also attempt in this brief to advise the Court of the proceedings in *Kelly*.*

I.

The questions are substantial and warrant plenary review in this Court.

This case represents another attempt to close the gap between the harsh actualities of welfare administration, isolated and insulated from the scrutiny of our legal system for decades, and abiding constitutional guarantees of fair and equal treatment. The issue is a narrow procedural one: whether due process of law mandates that a State afford individuals and families found after full investigation to be without resources, needy and eligible, a timely and adequate opportunity to be heard before an abrupt determination of ineligibility and withdrawal of the regular recurring subsistence grant for food, shelter and clothing.**

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* We are advised by counsel for Appellants in *Wheeler* that they would have no objections to having these cases argued together. We are informed that New York is pursuing an appeal in *Kelly* and we are prepared to adhere to any expedited schedule this Court deems appropriate.

** We do not deal here though with the substance of who is entitled to receive public assistance or to what extent. Cf. *King* v. *Smith*, 392 U. S. 309 (1968); *Thompson* v. *Shapiro*, 270 F. Supp. 331 (D. Conn. 1967), argued, 36 U. S. L. W. 3425 (U. S. May 7, 1968), reargued, 37 U. S. L. W. 3157 (U. S. Oct. 29, 1968) (No. 9, 1968 Term). Note, however, that the prior hearing issue was discussed in Appellee's Brief in *King* v. *Smith* (October Term, No. 949) at pp. 47-53.

This Court is called upon to rule not only on the timeliness of a termination hearing but also on the specific procedural safeguards constitutionally required in such proceedings. Although prior decisions of this Court provide persuasive support to the contentions of the plaintiff below (see Points II and III *infra*), we recognize that "[D]ue process is not a term of fixed and invariable content," *F. C. C.* v. *W. J. R.*, 337 U. S. 265, 275 (1949) and that this Court has not previously ruled on the precise questions involved in the context of welfare administration.

For obvious reasons this case is of the utmost importance to persons and families dependent on a public assistance grant for the basic necessities of life.* Its appropriate resolution calls for fulsome consideration of the factors bearing upon the requirements of procedural due process in the welfare context, such as the shattering impact of sudden and prolonged withdrawal of these subsistence benefits on adults, children and families, the kind of judgmental and controvertible findings on which caseworker decisions to cut off benefits so typically rest, and the actual timing of subsequent review. Because they define the need for and contours of due process in termination proceedings, we submit that these factors are deserving of careful examination and consideration in this Court.

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* In March 1968 some 4,180,000 adults and 4,209,000 children received categorical assistance. Another 749,000 persons received general assistance. California and New York have respectively the largest programs of Aid to the Aged and of AFDC and general assistance. *Welfare in Review*, U. S. Department of Health, Education and Welfare, September-October 1968, pp. 37, 38, 41, 43.

II.

Due process safeguards prior to the termination of benefits are a constitutional necessity in the context of welfare administration.

The federal and locally financed welfare programs are residual programs; under them the basic necessities—food, shelter, clothing—are furnished, most sparingly, to only the most impoverished individuals and families. Unlike benefit programs with waiting lists and a defined number of units, however, such as public housing, these are programs of unqualified statutory entitlements; all who meet the statutory conditions of eligibility are entitled to the grant.* The principal, though not the only, criterion of these programs is that of need, which must be acute; it, along with the other factors of eligibility, is initially established only after considerable investigation and verification.** Recipients are, as a condition of eligibility, denuded of all savings and valuable resources, save those essential for daily living, and reliance on the recurring grant, which itself borders at or below the subsistence level, is both compelled and absolute:

> "Suffice it to say that to cut off a welfare recipient in the face of this kind of 'brutal need' without a prior hearing of some sort is unconscionable . . . ." *Kelly*, p. 12.

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* *King* v. *Smith*, *supra*, at p. 317.

** The thoroughness of this procedure, the substantial burdens imposed on applicants, the indignities, delays, and frequent errors are described at length in *Eligibility Determination in Public Assistance*, 115 U. Pa. L. Rev. 1307 (1967).

The failure of the welfare system to meet its obligation to render accurate or fair decisions on a change in individual or family eligibility before abruptly withdrawing the grant has led to untold irreparable suffering and deprivation. The "play and action of purely personal and arbitrary power," * as demonstrated by the material in the records and the plight of plaintiffs in *Wheeler* and *Kelly*, is a salient characteristic of welfare administration.** Judge Feinberg concluded:

> "Against the justified desire to protect public funds*** must be weighed the individual's overpowering need in this unique situation not to be wrongfully deprived of assistance, and the startling statistic that post-termination fair hearings apparently override prior decisions to terminate benefits in a substantial number of cases. The obvious fact is that there is no way truly to make whole a recipient like Mrs. Velez for the indignity of living with her sister and thirteen children in one apartment because of a wrongful termination. The equally obvious remedy is to take greater care to prevent such injustice before it occurs." *Kelly*, p. 14.

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* *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370 (1886).

** Reports submitted by New York to the Court showed reversals or equivalent decisions, months after withdrawal of funds, in 36% of the cases. *Kelly* v. *Wyman*, n. 17. Reversals in Texas averaged 51% from 1958 to 1966. Bell and Norvell, *Texas Welfare Appeals: The Hidden Right*, 46 Tex. L. Rev. 223, 224 (1967).

*** Mississippi and Michigan provide a State fair hearing prior to termination of benefits. Mississippi Department of Public Welfare Manual, Vol. III, Sec. F, p. 6102; *Moore* v. *Houston*, No. 104435 (Wayne Co., Mich., Circuit Court, Consent Judgment, Nov. 1, 1968).

The structure and operation of the welfare system maximizes the danger of erroneous and arbitrary administrative action. Public assistance is a highly complex administrative program, involving a federal statute and HEW regulations (some published in the Federal Register, others in the Handbook of Public Assistance Administration, and others in "State Letters"), state statutes, board rules, and state and local regulations. At the same time standards and procedures are frequently vague or in conflict on crucial questions affecting recipients, leaving the answers to individual caseworker discretion or interpretation.* The pervasive requirements in these programs for establishing and re-establishing need, detailed and severe income and resource restrictions, broad requirements of disclosure, and extensive behavioral and moral constraints, all open up an extremely broad range of inquiry and entail persistent investigation of recipients.** Recipients, often illiterate and inarticulate and generally without access to legal assistance,*** are persons involved in a very unequal relationship with a caseworker and agency possessing enormous discretionary power, ranging from authorization of

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* The confusion about the term "cohabit" in Alabama's substitute parent rule in the minds of various welfare officials in Alabama, described in *King* v. *Smith* at 392 U. S. 314, is unfortunately typical. See *Texas Welfare Appeals, supra,* and Alan Keith-Lucas, *Decisions About People in Need* (Chapel Hill, Univ. of N. Car. Press, 1959).

** Indeed California apparently requires its hard-pressed staff to re-determine eligibility "no less often than once a month with respect to over one and one-quarter million public assistance recipients" (Motion to Affirm, p. 5) although federal requirements call for re-determination once every 12 months for Aid to the Aged and every six months for AFDC.

*** Brian, *Welfare from Below: Recipients' Views of the Public Welfare System,* 54 Calif. L. Rev. 370 (1966).

special grants for clothing and special diets to termination of the entire regular grant.* Cooperation, information and response are often assumed as a matter of right by the caseworker, whose demands are backed up by the power to terminate. The welfare system must also acknowledge excessive caseload handled by an inadequate, overworked and insufficiently trained staff, as well as haphazard and spotty investigations. Couple with all of this local political pressures and a deep suspicion of welfare recipients,** and the dangers of "honest error or irritable misjudgment" (*Kelly*, p. 22) are indeed greater here than in most administrative programs.

It is precisely because of these dangers that the Constitution requires an adequate opportunity to be heard before a particular determination in respect to an individual is implemented:

> "Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." *Hannah* v. *Larche*, 363 U. S. 420, 442 (1960).

Due process hearing safeguards are particularly vital where the government acts, as in welfare terminations,

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* Moreover, a study of New York City recipients showed that over half felt "ashamed" to be on welfare and a third felt that their caseworkers did not want to be bothered by them. Lawrence Podell, *Families on Welfare in New York City, Report No. 5*, City University of New York, 1968, pp. 10-11.

** Such measures as the freeze on federal matching payments in the AFDC program, effective July 1, 1969, but underscore the need for effective procedural safeguards as States attempt to restrict the number of persons receiving public assistance.

upon judgments about the conduct, character, veracity or trustworthiness of the individual, *Willner* v. *Committee on Character and Fitness,* 373 U. S. 96 (1963); *Greene* v. *McElroy,* 360 U. S. 474 (1959); *Goldsmith* v. *U. S. Board of Tax Appeals,* 270 U. S. 117 (1926); *Armstrong* v. *Manzo,* 380 U. S 545, 552 (1965). As seen in the case of the plaintiff herein, and the record in *Kelly,* disputed terminations involve rather intricate questions about the resources of recipients and their relatives and friends, the nature of the relationship between recipients and other persons, the extent of "cooperation" with the agency, the whereabouts, health, conduct, present and past employment of children, husbands, putative fathers, and the recipient, the availability and appropriateness of the recipient for work, of employment, and of child day-care centers.*

The absence of timely procedural safeguards also poses serious dangers to other constitutionally protected free-

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*In comparing the AFDC and OASDI programs, the United States in its amicus brief filed in *Kelly* well depicted the problems:

> "There is a much greater likelihood of change in the amount of a recipient's payment under AFDC, than there is in OASDI, or even in the other public assistance categories . . . . If the recipient obtains temporary employment for a month, he will be eligible only for a reduced payment, or perhaps no payment at all; when the income ceases, the family will probably be eligible for the full amount previously paid. Support payments may be made by an absent father for a few months and then cease. The problem, therefore, of the proper procedures to be followed in AFDC is more difficult for both the recipient and for the State agency, than is the comparable situation in OASDI" (p. 17).

The United States explicitly declined to express a view on the constitutional issue and maintained that regardless of the decision in *Kelly*

> "it does not appear that the validity of the Federal policies [permitting but not requiring a hearing prior to termination] under either the Federal statute or the Constitution is in issue here" (Brief, p. 3).

doms.* Welfare administration entails many constitutionally dubious practices, such as frequent visits to, and inspections and searches of, the home, intrusive questioning, requests for answers to incriminating questions about paternity or cohabitation and the like.** These widespread practices have rarely been contested by welfare recipients, since objection is deemed non-cooperation warranting termination of the grant. Without some adequate opportunity to be heard before cut-off, Fourth, Fifth and Fourteenth Amendment rights are constitutional luxuries beyond the pocketbook of welfare recipients. As recipients organize and petition welfare departments for redress of grievances, First Amendment rights too call for the protection of adequate procedural safeguards.

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* Cf., *Thorpe* v. *Durham Housing Authority* (No. 20, argued October 22, 1968); *Holt* v. *Richmond Redevelopment and Housing Authority*, 266 F. Supp. 397 (E. D. Va. 1966) (barring eviction ostensibly for undisclosed resources but actually for tenant organizing). Though there are similarities, there are also differences in the factors bearing upon constitutional requirements of administrative hearings in public housing evictions and welfare terminations. The eligibility requirements for public assistance are greater in number and complexity, the grounds for termination of the welfare grant are correspondingly more numerous, and eligibility is the subject of more pervasive investigation. The decision to terminate is directly and abruptly implemented, without any judicial proceedings, and hence there is no analogy to the eviction proceeding in public housing. There are also differences in the impact of termination of a government benefit which covers not only housing, but also food, clothing, medicines and other essentials of life.

** See Reich, *Midnight Searches*, 72 Yale L. J. 1347 (1965); *Parrish* v. *Civil Service Commission*, 66 Cal. 2d 260, 425 P. 2d 223 (1967).

III.

Due Process requires, and California and New York fail to provide, an adequate hearing prior to termination of benefits with the minimal procedural safeguards of appraisal of the issues and sources of evidence, an opportunity to confront and question persons supplying such evidence, and a decision rendered solely on the open record by a relatively impartial official.

The constitutional objections to the California recipient-caseworker conference mechanism is that it plainly fails on its face to provide an adequate hearing, however informal, for resolution of the factual issues underlying termination. The State-approved "Notice of Action" form (Appendix C herein) referred to in the California regulation* specifically validates cryptic reasons such as "excess income" and "change in living arrangement."** The "meeting" afforded in the regulation contemplates neither the receipt of the actual evidence of ineligibility nor the opportunity to question the sources of such evidence. Rather the recipient may only meet with and put arguments to the person who made the initial decision being challenged.*** It is that person alone, the case or eligibility worker, who informs the recipient of the reasons for his decision and the evidence he deems appropriate to reveal. Thus, the recipient must, after one or two days notice, attempt to disprove such evidence first learned at

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* Jurisdictional Statement, Appendix F.

** Certainly in many, if not most, cases, the "additional information needed" space will be left blank.

*** The Notice states ("[The caseworker] will be available to discuss the above problem with you. . . .")

the meeting, without the opportunity to confront the source or to put questions to him. On this basis the recipient is expected to convince the caseworker or eligibility worker that his initial decision was incorrect. Such a procedure is plainly without any of the elemental safeguards of due process.

As the court in *Kelly* held, due process does not require a formal judicial trial on eligibility prior to termination, but rather a hearing meeting those "minimum procedural safeguards [required] in the context of the welfare system", p. 17, to wit:

(a) Notice of the true reasons for the termination, clearly stated:

> "[T]he very summary form of notice of proposed terminations makes an intelligent reply difficult. Not only are the reasons given often incomprehensively vague, but additional or wholly different reasons may in fact be behind the decision to terminate" (p. 21).*

(b) An opportunity to appear "in person" (p. 19), so that the nature of the charges and the evidence may be revealed, and to produce evidence in rebuttal (pp. 21-22).

(c) "Where termination of benefits 'depends upon information supplied by a particular person whose reliability or veracity is brought into question by the applicant, confrontation and the right of cross-examination should be afforded' " (p. 23).

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* See Appendix D for a notice in New York, dated November 20, 1968, giving as the reason for proposed termination "failure to cooperate with Departmental policy," a classic and unfortunately typical "vague or cryptic charge" (p. 20).

(d) "[T]he decision of the reviewing official must be based solely on evidence before him which has been made available to the recipient . . ." (p. 26).

(e) A review officer "who has become too deeply involved in a case conscientiously to undertake an impartial review" will not conduct the hearing (n. 43). This refers to supervisors two ranks above the front-line caseworker approved as a review officer in *Wheeler*.*

There cannot be such disparate standards of due process for welfare recipients about to be deprived of vital grants; the sharply contrasting decisions of these two three-judge courts requires plenary consideration of this matter by this Court.

IV.

A trial-type hearing months after all aid has ceased cannot rectify the failure to provide a due process proceeding prior to termination of aid.

The court below considered California's pre-termination procedure constitutional "in light of" the provision for a trial-type hearing within two months after termination. This position cannot be sustained both because of the terrible injury inflicted during even a two month period and because, as the records in *Wheeler* and particularly *Kelly* amply demonstrate, hearings simply are not concluded in the time period upon which the court relied.

Responding directly to the *Wheeler* decision, Judge Feinburg stated:

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*See also *Wasson* v. *Trowbridge*, 382 F. 2d 807, 812 (2d Cir. 1967).

"While post-termination review is relevant, there is one overpowering fact which *controls* here. By hypothesis, a welfare recipient is destitute, without funds or assets." *Kelly*, p. 9 (emphasis supplied).*

Perhaps the decision of the court in *Wheeler* was colored by the fact that Mrs. Wheeler received a monthly Social Security check of $44.60 and had an adult son with assets; as the record in *Kelly* shows, such a situation is not typical.

The *Wheeler* decision assumes the rendering of post-termination hearing decisions within the 60-day federal limit. Handbook, Part IV, §6200(j). The States simply do not and will not render decisions within that time or anything approximating it, unless there is a systemic reason for expedition (such as the requirement that benefits be paid pending a decision).** Mrs. Wheeler waited over four months for the decision in the subsequent hearing. During the last several years, up to and through the 9 month period when *Kelly* v. *Wyman* was before the Court, New York averaged 90 to 150 days before a decision was forthcoming, with fewer than 10% of the termination decisions rendered in less than 60 days. Due process cannot be satisfied by proceedings so delayed.

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* The court went on to hold explicitly that "due process requires an adequate hearing before termination of welfare benefits, and the fact that there is a later constitutionally fair proceeding does not alter the result." *Kelly*, pp. 14-15.

** The utter inability of HEW to obtain compliance with its 60-day regulation is likely a factor behind the proposed regulation set forth in Appendix B. Indeed New York asserted in the *Kelly* proceedings that such delay keeps down the number of hearings and thereby saves money.

CONCLUSION

Defendants' motion to affirm should be denied.

Respectfully submitted,

LEE A. ALBERT
PAUL M. DODYK
HENRY A. FREEDMAN
401 West 117th Street
New York, New York 10027

Attorneys for the Columbia Center on Social Welfare Policy and Law

MARTIN GARBUS
156 Fifth Avenue
New York, New York 10010

Attorney for the Roger Baldwin Foundation of the American Civil Liberties Union

HAROLD J. ROTHWAX
DAVID DIAMOND
DAVID GILMAN
MARIANNE ROSENFIELD
PETER H. DARROW
320 East 3rd Street
New York, N. Y. 10009

Attorneys for Mobilization for Youth

RICHARD KWASNIK
1260 Boston Road
Bronx, New York 10456

Attorney for Morrisania Legal Services

LOUISE GRUNER GANS
260 Broadway
Brooklyn, New York

Attorney for Williamsburg Neighborhood Legal Services

SHYLEUR BARRACK
290 Lenox Avenue
New York, New York 10027

Attorney for the Legal Aid Society

Richard Kwasnik
1260 Boston Road
Bronx, New York 10456
Attorney for Morrisania Legal Services

Louise Gruner Gans
260 Broadway
Brooklyn, New York
Attorney for Williamsburg Neighborhood Legal Service

Shuzaur Rahbar
290 Lenox Avenue
New York, New York 10027
Attorney for the Legal Aid Society

APPENDIX A

Opinion of the United States District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Three-judge Court

68 Civ. 394

68 Civ. 864

JOHN KELLY, *et al.*,

Plaintiffs,

RUBY SHEAFE, *et al.*,

Plaintiffs,

—and—

TERESA NEGRON, *et al.*,

Intervenor-Plaintiffs,

—against—

GEORGE K. WYMAN, *et al.*,

Defendants.

Before:

FEINBERG, *Circuit Judge,*
BRYAN and MCLEAN, *District Judges.*

LEE A. ALBERT, Esq.,
HENRY A. FREEDMAN, Esq., and
BRIAN GLICK, Esq., New York, N. Y.
Attorneys for Plaintiffs and Intervenor-Plaintiffs.

Harold J. Rothwax, Esq.,
David Gilman, Esq.,
David Diamond, Esq.,
Stephen Wizner, Esq.,
Marianne Rosenfield, Esq.,
Peter H. Darrow, Esq., and
Robert Sugarman, Esq., New York, N. Y.
Attorneys for Plaintiffs and Intervenor-Plaintiffs.

Martin Garbus, Esq., New York, N. Y.
Attorney for Plaintiffs and Intervenor-Plaintiffs.

Mary B. Tarcher, Esq.,
Mort Cohen, Esq., and
Louise Gruner Gans, Esq., New York, N. Y.
Attorneys for Plaintiff Frye.

Carl Rachlin, Esq., and
Stephen Nagler, Esq., New York, N. Y.
Attorneys for Plaintiffs Sheafe, et al., and Intervenor Plaintiffs.

Shyleur Barrack, Esq., and
Richard Kwasnik, Esq., New York, N. Y.
Attorneys for Plaintiff Lett.

Louis J. Lefkowitz, Esq., Attorney General, State of New York
Attorney for Defendant Wyman
Joel H. Sachs, Esq., *Of Counsel.*

J. Lee Rankin, Esq., Corporation Counsel, City of New York
Attorney for Defendant Goldberg.
John J. Loflin, Esq.,
Merrill Charlton, Esq.,

MILTON L. PLATT, Esq., and
SAMUEL FELDER, Esq., *Of Counsel.*

EDWIN L. WEISL, JR., Esq., Assistant Attorney General, Civil Division, Department of Justice.

ROBERT M. MORGENTHAU, Esq., United States Attorney for the Southern District of New York.

LAURENCE VOGEL, Esq., Assistant United States Attorney, *Of Counsel.*

Amicus curiae brief for the United States.

FEINBERG, *Circuit Judge*:

These consolidated actions present another in the increasing number of attacks on prevailing state welfare practices.[1] Plaintiffs claim that the procedures in New York State for termination of welfare benefits deny due process and violate both the Social Security Act and regulations of the United States Department of Health, Education, and Welfare (HEW). The eight plaintiffs (six in one action, two in the other) are New York City welfare recipients; their complaints sought the convening of a three-judge court and declaratory and injunctive relief under the Civil Rights Act, 42 U. S. C. §1983, and the Social Security Act, 42 U. S. C. §§301 et seq. Defendants are the Commissioner of the New York State Department of Social Services, the State Board of Social Welfare and the Commissioner of the New York City Department of Social Services. In May 1968, over the objections of defendants,

[1] See, e.g., King v. Smith, 392 U. S. 309 (1968); Thompson v. Shapiro, 270 F. Supp. 331 (D. Conn. 1967), argued, 36 U. S. L. W. 3425 (U. S. May 7, 1968), reargued, 37 U. S. L. W. 3157 (U. S. Oct. 29, 1968) (No. 813, 1967 Term; renumbered No. 9, 1968 Term); Parrish v. Civil Serv. Comm'n, 66 Cal. 2d 260, 425 P. 2d 223, 57 Cal. Rptr. 623 (1967).

Judge Bryan convened a three-judge court pursuant to 28 U. S. C. §§2281, 2284. —— F. Supp. —— (S. D. N. Y. 1968). Thereafter, a briefing schedule was fixed and hearings were held in June and July on a number of motions. Because of the interest of the United States in the monies expended under New York State and City welfare programs and in the procedures set up to administer them, the court invited the United States to submit an amicus brief, which it did in early October 1968. For reasons hereafter indicated, we grant plaintiffs' motion for a preliminary injunction in part and deny it in part, and deny defendants' motion for summary judgment; the disposition of other motions is set forth in detail below.

I

Welfare programs in the United States generally fall into two groups: general assistance and categorical assistance.[2] The former is financed only by state and local governments; the latter refers to programs supported by grants from the federal government under the Social Security Act to give aid to particular categories of individuals, e.g., aid to families with dependent children (AFDC). Four of the original plaintiffs in this action[3] were recipients of general assistance, home relief under the New York Social Welfare Law. The other four[4] were recipients of AFDC, which New York State administers in accordance with the Social

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[2] See Note, Federal Judicial Review of State Welfare Practices, 67 Colum. L. Rev. 84 (1967).

[3] John Kelly, Randolph Young, Juan DeJesus and Ruby Sheafe.

[4] Pearl McKinney, Pearl Frye, Altagracia Guzman and Esther Lett. Twelve additional plaintiffs also sought to intervene. Of these, 10 were also in the AFDC program, and 2 received home relief only.

Security Act, 42 U. S. C. §§601-09. Funds of the United States are involved only in the latter program.

It is instructive on the state of administration of public welfare to review how both federal and New York State and City regulations have changed just since the institution of this consolidated action. At the time the complaints were filed, state regulations dealing with both home relief and AFDC programs apparently required no *prior* notice at all of suspension of benefits and no hearing *prior* to that action. However, a state hearing procedure, which is designated as a "fair hearing," had been instituted to provide an administrative remedy *after* suspension or termination of benefits; in the case of home relief, the procedure went into effect barely two weeks before the first complaint was filed in this case. After the action began, the State Department of Social Services amended its regulations, effective March 1, 1968, to provide notice and an "administrative hearing" *before* termination of public assistance. Thereafter, apparently because the New York City Department of Social Services felt that it could not feasibly comply with that regulation, it was repealed, and a new regulation was adopted. Under it, welfare departments may choose one of two options described below, both of which continue to provide notice and a type of hearing before cessation of benefits. Subsequent to the State amendments, HEW adopted a new criterion for the administration of state plans, effective July 1, 1968, which requires that the agency:

> Gives advance notice of questions it has about an individual's eligibility so that a recipient has an opportunity to discuss his situation before receiving formal written notice of reduction in payment or termination of assistance.

Handbook of Public Assistance Administration, Part IV, §2300(d)(5) (1968) ("Handbook").

The remedies for a welfare recipient who has been wrongfully suspended or terminated have also been changed in another significant respect. At the time the suit was commenced, New York granted a reinstated recipient retroactive benefits for only two months and then only to the extent of debts for necessities which had been incurred.[5] Since the delay between wrongful termination of benefits and subsequent reinstatement often exceeded two months, the limit on retroactivity worked hardship. However, effective July 1, 1968, pursuant to a change in regulations issued by HEW, payments are now made fully retroactive and are not confined to reimbursement for debts incurred.[6]

As a result of these changes, welfare recipients in New York State now have a two-step procedure to protect them against allegedly wrongful termination or suspension of benefits. The first, or pre-termination procedure, depends upon which of two options the local welfare agency has adopted. We are advised that in New York State, option (a) is in effect everywhere but in New York City, which has chosen to follow option (b). Both options are set forth in the margin.[7] Under option (a), the local agency

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[5] See 18 NYCRR 325.5(n)(5) (superseded 1968).

[6] See Handbook, Part IV, §§6200(k), 6300(g) (1968); 18 NYCRR 325.5(n)(6), as amended (Order of New York State Dept. of Social Services, June 28, 1968).

[7] Proposed discontinuance or suspension of grant; prior notice to recipient; additional local review and subsequent determination. When a social services official proposes to discontinue or suspend a grant of public assistance he shall proceed in accordance with the provisions of either subdivision (a) or (b) below:

(a) He shall notify the recipient in writing of his intention to discontinue or suspend the grant at least seven days prior

(footnote 7 continued)
to the proposed effective date of the discontinuance or suspension, together with the reasons for his intended action, unless such discontinuance or suspension is in response to the request of the recipient or is due to: the death of the recipient who is an unattached person; the recipient's admission to an institution wherein his assistance may not be continued; the recipient's whereabouts being unknown to the social services official because the recipient moved from his last known address without notifying the social services official and without leaving a forwarding address; the recipient's moving from the state and establishing his permanent home elsewhere; the recipient's case having been reclassified as to category. Such notification shall further advise the recipient that if he makes a request therefor he will be afforded an opportunity to appear at the time and place indicated in the notice before the person identified therein who will review his case with him and will afford him opportunity to present such written and oral relevant evidence and reasons as the recipient may have to demonstrate why his grant should not be discontinued or suspended, and that the recipient may appear and present such evidence and reasons on his behalf with or without the assistance of an attorney or other representative. Only the social services official or an employee of his social services department who occupies a position superior to that of the supervisor who approved the proposed discontinuance or suspension shall be designated to make such a review. When a recipient requests such a review the designated person shall, at the time and place indicated in the notice to the recipient, review with the recipient and his representative, if any, the evidence and reasons supporting the proposed action and shall thereupon afford the recipient opportunity to present relevant evidence and to state reasons why the proposed discontinuance or suspension should not be made. When such a review has been made by a designated employee, such employee shall promptly make an appropriate written recommendation to the social services official, together with his reasons therefor, including reference to applicable provisions of law, Board rules, Department regulations, and approved local policy. After such a review the social services official shall expeditiously determine whether the proposed discontinuance or suspension shall or shall not be made effective as proposed, after considering all the evidence before him and the recommendation, if any, of the employee designated by him to review the proposed action with the recipient. The social services official shall then promptly send an appropriate written notice of his decision to the recipient and his representative, if any, and to the Department's area office. Assistance shall not be discontinued

(footnote 7 continued)

or suspended prior to the date such notice of decision is sent to the recipient and his representative, if any, or prior to the proposed effective date of discontinuance or suspension, whichever occurs later.

(b) A social services official may adopt a local procedure concerning discontinuance or suspension of grants of public assistance and submit to the Department such procedure for its approval. Upon approval such local procedure shall become effective. Such local procedure must include the following:

(1) Notice to the recipient of proposed discontinuance or suspension of the grant at least seven days prior to the proposed effective date of the discontinuance or suspension, together with the reasons for the intended action, unless such discontinuance or suspension is in response to the request of the recipient or is due to: the death of the recipient who is an unattached person; the recipient's admission to an institution wherein his assistance may not be continued; the recipient's whereabouts being unknown to the social services official because the recipient moved from his last known address without notifying the social services official and without leaving a forwarding address; the recipient's moving from the state and establishing his permanent home elsewhere; the recipient's case having been reclassified as to category.

(2) The notice must advise the recipient that, if he so requests, the proposed discontinuance or suspension will be reviewed and he may submit in writing a statement or other evidence to demonstrate why his grant should not be discontinued or suspended.

(3) A review of the proposed discontinuance or suspension shall be made by the social services official or an employee of his social services department who occupies a position superior to that of the supervisor who approved the proposed discontinuance or suspension.

(4) After review of the relevant materials in the recipient's file including any written material submitted by him the decision shall be made expeditiously as to whether the proposed discontinuance or suspension shall or shall not be made effective as proposed. Appropriate written notice of the decision shall be sent to the recipient and to the Department's area office. Assistance shall not be discontinued or suspended prior to the date such notice of decision is sent to the recipient and his representative, if any, or prior to the proposed effective date of discontinuance or suspension, whichever occurs later.

18 NYCRR 351.26.

must give seven days written notice, specifying the reasons for suspension, before aid is stopped. The recipient is entitled to appear before an official, who is superior to the one who approved the suspension, and can present oral and written evidence with the aid of an attorney or other representative. Option (b), adopted by New York City, offers less procedural protection; e.g., although the notice provision is the same, the welfare recipient is entitled to submit a statement in writing to demonstrate why aid should continue. Under either option, if the recipient is unsuccessful, benefits cease. Thereafter, the terminated recipient is entitled to the second step, the so-called state "fair hearing,"[8] which spells out significant procedural rights and is a trial-type proceeding. Thus, that hearing is before an independent state hearing officer; the complaining recipient has the right of confrontation and cross-examination of the witnesses against him; and a verbatim record is made of the hearing. The state regulations provide that the state fair hearing is to be held within ten working days of receipt of a request for the hearing, and a decision is to be rendered as soon as feasible, and, in any event, not later than twelve working days from the close of the hearing.[9]

II

Plaintiffs allege that even with the improved procedures, they are threatened with termination of assistance in a

[8] 18 NYCRR 84.2-.23.

[9] We are advised by the amicus brief of the United States that HEW has found that the new state "fair hearing" plan is not acceptable, as it fails to comply with federal standards, see Handbook, Part IV, §§6000-6500 (1968), in several respects, but that New York is in the process of revising the plan to meet federal requirements.

manner that is both unconstitutional and improper under the governing statute and regulations. Their constitutional argument is that under the due process clause of the fourteenth amendment they are entitled to a constitutionally adequate hearing before termination of benefits and that the procedures provided by the state and city do not meet this standard. Defendants do not deny plaintiffs' general propositions that the terminations here under attack amount to "state action" and that the protections of the due process clause apply. Nor do defendants attempt to argue that welfare benefits are a "privilege," rather than a right, and that therefore they may fix the procedures of termination as they see fit.[10] However, defendants do claim that the combined hearing procedures now provided to welfare recipients meet constitutional and statutory requirements.

We agree with defendants that the state fair hearing procedure after termination of benefits seems constitutionally sufficient.[11] Defendants argue that combining the post-termination procedure with an informal pre-termination "hearing" disposes of all due process claims, citing principally Wheeler v. Montgomery, No. 48303 (N. D. Cal. April 17, 1968) (three-judge court), appeal docketed, 37 U. S. L. W. 3152 (U. S. Oct. 22, 1968) (No. 634). In that case, as in this, state hearing procedures for termination

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[10] Cf. C. Reich, The New Property, 73 Yale L. J. 733 (1964); W. Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968).

[11] Although one of the United States' objections to this procedure, see note 9 supra, is that it fails to provide specifically that the hearing officer's decision must be based only upon evidence which is a part of the record, for constitutional purposes we would construe the regulations, see 18 NYCRR 84.15(a), to include such a requirement, in accordance with this opinion.

of welfare changed during the litigation. There, the state provided an "informal conference" before termination and a full hearing procedure within a few months thereafter. The court determined the constitutionality of the former "in light of" the latter and held that the combined procedure complied with due process.[12]

While post-termination review is relevant, there is one overpowering fact which controls here. By hypothesis, a welfare recipient is destitute, without funds or assets. The case of Angela Velez, one of the proposed intervenors, makes the point starkly. She was terminated on March 11, 1968, because her husband allegedly visited her home every night. She requested the post-termination state fair hearing in mid-March. The hearing was held in June, and, pursuant to the request of this court for expedition, the decision issued on July 10. The State Commissioner found that the information that caused suspension of benefits came from Mrs. Velez's landlady, that the information was untrue, that the husband does not live with his wife, that she had obtained a court order in 1966 to prevent his night visits, that he is allowed to visit the four small children only on Wednesday, and that at that time he brings his support money of $30 a week, but no more, in accordance with an agreement worked out in Family Court. Accordingly, the State Commissioner directed the local agency to reinstate assistance. However, in the four months between termination of AFDC benefits and the decision reversing the local agency, Mrs. Velez and her four children, ages one to six, were evicted from her apartment for nonpayment of rent and went to live with her

[12] Apparently a California state court disagreed with the California federal court. See McCullough v. Terzian, No. 379011 (Cal. Super. Ct., Alameda County, May 1968).

sister, who has nine children and is on relief. Mrs. Velez and three children have been sleeping in two single beds in a small room, and the youngest sleeps in a crib in the same room. Thirteen children and two adults have been living in one apartment, and Mrs. Velez states that she has been unable to feed her children adequately, so that they have lost weight and have been ill.

The case of Mrs. Esther Lett, one of the original plaintiffs, is also instructive. According to the affidavits of plaintiff Lett and her Legal Aid Society attorney: She and her four dependents, aged three months to fifteen years, were abruptly terminated from public assistance on February 1, 1968. The purported ground was that she had concealed her current employment by the Board of Education. In fact, she had worked for Operation Head Start in July and August 1967, but had not been employed by the Board of Education after August 20, 1967. Since that date and up to February 1968, she had worked at Day Care Centers on twenty-six different days, earning a total of $300, with the knowledge of the local welfare agency. As a result of termination of assistance, she and her dependents were forced to live on the handouts of neighbors. On February 18, she and her family had to go to the hospital for severe diarrhea, apparently brought on by the only meal they had had that day—spoiled chicken and rice donated by a neighbor. She applied for emergency aid and a post-termination state "fair hearing" but the aid was refused and the fair hearing was not scheduled. Through the herculean efforts of The Legal Aid Society, including numerous telephone calls and three personal trips to local agencies, it was learned that the Board of Education had apparently made an error. However, the Board would not so inform the welfare agency

until it requested a new verification. On Tuesday, February 27, Mrs. Lett went to a local center to seek emergency aid. Because she had not eaten all day, she fainted in the center, but when she awoke she was told that she could not get money for food immediately because it had not yet been authorized. Finally, after waiting eight hours, she was given $15 to feed herself and four dependents and told to return on Friday. After suit was brought, her assistance was apparently temporarily reinstated without prejudice.

We do not know what the truth is with regard to Mrs. Lett's alleged concealment of employment, although on the present record it appears that the termination of benefits was improper.[13] As for Mrs. Velez, it is clear that the decision to terminate her payments was wrong. But the issue is not whether a specific termination was proper, but whether the procedures used were justifiable. There is no need to elaborate with further case histories. Suffice it to say that to cut off a welfare recipient in the face of this kind of "brutal need"[14] without a prior hearing of some sort is unconscionable, unless overwhelming considerations justify it. Traditionally, such considerations have been urgent in nature and involve the health, safety, or well-being of many individuals. "Drastic administrative action is sometimes essential to take care of problems that cannot be allowed to wait for the completion of formal proceedings." 1 K. Davis, Administrative Law Treatise

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[13] Benefits to Mrs. Lett had also been suspended during March 1967; the suspension was found to be improper in a fair hearing decision in November 1967.

[14] See Note, Withdrawal of Public Welfare: The Right to a Prior Hearing, 76 Yale L. J. 1234, 1244 (1967) ("Yale Note").

¶7.08, at 438 (1958), citing cases where great harm to the public was, or could be, immediately threatened.[15]

We turn then to examine the pressing need here that would justify a departure from the general standard of "the requisite [due process] hearing . . . before the final order becomes effective."[16] Simply stated by defendant New York City Commissioner, it is the "need to protect the public's tax revenues." This is, of course, not only a legitimate, but a necessary, concern of defendants, but the argument requires close analysis. Clearly, the state must see to it that assistance goes only to those who are entitled to it. However, the issue here affects only the continuation of benefits while a claim of ineligibility is disputed. Defendants' asserted justification for the termination procedures now being used is therefore quite narrow. It is the additional cost of providing more elaborate procedures to determine whether the tentative decision to terminate benefits was correct, a cost which may come both from an increase in the number of hearings and from an extension of average time from notice of termination to end of hearing, during which period benefits continue. It is clearly within the power of the state and city to minimize that additional cost by various methods, e.g., by expediting hearings, by increasing the number of hearing officials, by utilizing statutory rights to recover monies paid since the date of ineligibility. Cf. Snell v. Wyman, 281 F. Supp. 853 (S. D. N. Y. 1968), appeal docketed, 36 U. S. L. W. 3489 (U. S. June 10, 1968) (No. 1529, 1967

[15] E.g., Ewing v. Mytinger & Casselberry, Inc., 339 U. S. 594 (1950) (mislabeled food products); Fahey v. Mallonee, 332 U. S. 245 (1947) (summary seizure of savings and loan association by conservator). See also cases cited in Yale Note 1240-41 nn. 26-35.

[16] Opp Cotton Mills, Inc. v. Administrator, 312 U. S. 126, 152-53 (1941).

Term; renumbered No. 191, 1968 Term). Moreover, it should be remembered that, insofar as AFDC or other categorical assistance is concerned, federal contributions are available to meet fifty per cent of the cost of benefits paid pending review and the administrative expense of the hearing procedures. See Handbook, Part IV, §6500 (1968).

Against the justified desire to protect public funds must be weighed the individual's overpowering need in this unique situation not to be wrongfully deprived of assistance, and the startling statistic that post-termination fair hearings apparently override prior decisions to terminate benefits in a substantial number of cases.[17] The obvious fact is that there is no way truly to make whole a recipient like Mrs. Velez for the indignity of living with her sister and thirteen children in one apartment because of a wrongful termination. The equally obvious remedy is to take greater care to prevent such injustice before it occurs. While the problem of additional expense must be kept in mind,[18] it does not justify denying a hearing meeting the ordinary standards of due process.[19] Under all the circumstances, we hold that due process requires an adequate hearing before termination of welfare benefits, and the fact

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[17] Thus, it appears from the state wide figures submitted by defendants that in the fair hearings on discontinuance which reached decision from April through August of this year, only 50 of 78 cases, or 64%, were affirmed. Seventeen were reversed in whole, 1 in part, 3 remanded, and 7 received "miscellaneous" dispositions. Later figures for September and October, just submitted by defendants, show a higher percentage of affirmances.

[18] It has been noted that "the welfare system is designed to save money instead of people, and tragically ends up doing neither." David Ginsburg, Exec. Dir. Nat'l Advisory Comm'n on Civil Disorders, 23 Record of N. Y. C. B. A. 28 (Supp. 1968), quoting Mitchell Ginsberg, former head of New York City's Department of Welfare.

[19] Cf. D. Morris, Welfare Benefits as Property: Requiring a Prior Hearing, 20 Admin. L. Rev. 487, 506 (1968): "The state

that there is a later constitutionally fair proceeding does not alter the result.[20] In short, we must focus on the adequacy of the hearing procedures which defendants have provided prior to termination of benefits.

III

Cases dealing with procedural requirements of a hearing before an administrative tribunal are many and varied, involving such diverse administrative actions as discharge from public employment,[21] refusal to license,[22] revocation

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interest which circumscribes the property interest of a welfare recipient and also affects the type of procedural due process afforded is not the state's interest in its funds, but only whether the funds themselves accord with the aims of society."

[20] We note, in this context, that the United States indicates that HEW is presently considering adoption of a policy by which assistance would continue until a fair hearing decision was reached in at least some types of termination cases. This consideration, along with the present federal requirement of advance notification and opportunity for discussion, see pp. 5a-6a supra, reinforces our expectation that providing adequate prior hearings will not unduly burden the administration of the welfare system.

Of course, we do not suggest that the same procedures are constitutionally requisite in all forms of social security administration. In the operation of the federally-administered Old-Age, Survivors, and Disability Insurance program, for example, the amicus brief indicates that no hearing prior to termination is available as of right. However, as that brief points out, there are far fewer reasons for termination of OASDI benefits than in the AFDC program, and these reasons are based on more objectively ascertainable facts. In OASDI the circumstantial changes on which termination is based are nearly always reported or confirmed by the recipient himself, and the likelihood of severe hardship resulting from erroneous termination is certainly not as great as in the welfare programs here in issue.

[21] Slochower v. Board of Educ., 350 U. S. 551, 554 (1956); cf. Parker v. Lester, 227 F. 2d 708 (9th Cir. 1955).

[22] Bratton v. Chandler, 260 U. S. 110 (1922); Hornsby v. Allen, 326 F. 2d 605 (5th Cir. 1964).

of security clearance,[23] treatment of aliens,[24] and admission to the bar,[25] to name only a few. Before considering plaintiffs' formidable list of objections to the pre-termination hearing procedures afforded welfare recipients, some observations based upon these and related cases may be in order.

1. It is impossible to define rigidly what constitutes procedural due process for all purposes. "[D]ue process of law has never been a term of fixed and invariable content." FCC v. WJR, 337 U. S. 265, 275 (1949). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Cafeteria Workers Local 473 v. McElroy, 367 U. S. 886, 895 (1961).

> "Due process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. . . . [A]s a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.

Hannah v. Larche, 363 U. S. 420, 442 (1960).

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[23] Greene v. McElroy, 360 U. S. 474 (1958).

[24] Kwong Hai Chew v. Colding, 344 U. S. 590 (1953).

[25] Willner v. Committee on Character and Fitness, 373 U. S. 96 (1963). See also Goldsmith v. U. S. Board of Tax Appeals, 270 U. S. 117 (1926).

2. While it is a well established principle that courts should not decide issues of procedural deficiency on constitutional grounds if any other avenues of decision are open, see Greene v. McElroy, 360 U. S. 474, 509 (1959) (concurring opinion); Ashwander v. TVA, 297 U. S. 288, 346-47 (1936) (concurring opinion), we believe that the constitutional issues must be faced here. It is true that plaintiffs not only invoke due process but also rely on the requirement of the Social Security Act, 42 U. S. C. §602(a)(4) that

> A State plan for aid and services to needy families with children must . . . (4) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for aid to families with dependent children is denied or is not acted upon with reasonable promptness . . . .[26]

By interpreting the statutory phrase "fair hearing" in the context of pre-termination procedures,[27] we might have avoided the constitutional questions. See Greene v. McElroy, 360 U. S. 474, 496-97, 507-08 (1959). However, the command of the federal statute does not apply to state and local general assistance, for which no federal funds are provided. Six of the original and intervening plaintiffs[28] receive such assistance only; as to them the constitutional issue is squarely posed.

3. We must thus decide what specific procedural safeguards are constitutionally required for welfare recipients

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[26] Cf. 42 U. S. C. §§302(a)(4), 1202(a)(4), 1352(a)(4), 1382(a)(4).

[27] See recent HEW regulation quoted at p. 5a, supra.

[28] See notes 3, 4 supra and accompanying text.

in a pre-termination proceeding. While the Supreme Court has been solicitous to assure "traditional forms of fair procedure" in administrative hearings, Greene v. McElroy, supra, 360 U. S. at 508, we do not believe that every person directly affected by administrative action must be afforded all of the procedural rights guaranteed in a full-fledged judicial trial. See, e.g., Dixon v. Alabama, 294 F. 2d 150, 159 (5th Cir.), cert. denied, 368 U. S. 930 (1961); cf. Hyser v. Reed, 318 F. 2d 225 (D. C. Cir.), cert. denied, 375 U. S. 957 (1963). Rather, we are called upon to determine what minimum procedural safeguards are required here in the context of the welfare system.

IV

We turn first to the procedures provided under option (b) which is in effect in New York City. Option (b) provides for notice of "proposed discontinuance or suspension . . . together with the reasons for the intended action," and allows the recipient in response only to "submit in writing a statement or other evidence to demonstrate why his grant should not be discontinued . . . ." The option does not envisage a personal appearance.

A hearing on a proposed termination of welfare benefits is, of course, a classic instance of determination of what have been called "adjudicative facts—facts pertaining to a particular party." 1 K. Davis, Administrative Law Treatise ¶7.20, at 506 (1958). If the right to a hearing in this context, fairly construed, means anything, it is literally the right to be heard. This is hardly a novel idea. In Londoner v. Denver, 210 U. S. 373 (1908), the Supreme Court specifically rejected the notion that permission to submit objections in writing comported with due process,

and concluded that "a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal." 210 U. S. at 386. See also Goldsmith v. U. S. Board of Tax Appeals, 270 U. S. 117, 123 (1926). We do not deal here with the issue whether procedural due process requires the right to oral argument on a matter of law. See FCC v. WJR, 337 U. S. 265, 276 (1949). We have the different question whether a welfare recipient has the right to appear in person before the welfare agency to present his case. On an issue of such immediate and crucial impact as termination of welfare benefits, we conclude that the right to be heard means the right to be heard in person. Defendants cite to us Morgan v. United States, 298 U. S. 468, 481 (1936), and Boston & Maine R.R. v. United States, 208 F. Supp. 661 (D. Mass.), aff'd mem., 371 U. S. 26 (1962). It is true that *Morgan* contained the dictum that "[a]rgument may be oral or written," 298 U. S. at 481, but we do not take that to mean that in this case there is no constitutional right to present evidence, as opposed to argument, in person. Moreover, the case is clearly distinguishable on its facts.[29] In *Boston & Maine*, plaintiffs had had "a full opportunity to present their defense by oral and documentary evidence." 208 F. Supp. at 667.

Not only is the right to a personal appearance ordinarily implicit in the constitutional concept of a fair hearing, but

[29] *Morgan* was a challenge to administrative rate making; plaintiffs had had the opportunity to present oral argument on evidence before the agency in question; and the holding of the case was that decision could not be made by an officer who had not considered the evidence or argument. As to the subsequent treatment of *Morgan*, see W. Gellhorn & C. Byse, Administrative Law 1086-89 (4th ed. 1960).

the reality of the status of many welfare recipients makes the invitation to submit their cases in writing cruelly ironic. The burden of marshalling and writing down persuasive arguments in opposition to frequently vague or cryptic charges would discourage even a relatively well-educated layman. In fact, many welfare recipients clearly lack the education or sophistication either to understand the reason for their proposed termination or to prepare an adequate written defense.[30] Moreover, a review of the cases of the individual plaintiffs in this action is persuasive that many of the disputes as to eligibility could have been easily resolved by an interchange of questions and answers between the recipient and the welfare official supervising the case. In the case of Mrs. Lett, for instance,[31] a conference about the facts of her employment with an impartial official might have quickly cleared up the misunderstanding and prevented the severe hardships that she suffered. Certainly the give and take of an informal hearing would be more likely to produce a just disposition than an attempt on her part to furnish a written rebuttal of her alleged "failure to disclose assets."

Even if the majority of welfare recipients were educationally equipped to write a clear statement of the reasons why they should not be terminated, the very summary form of notice of proposed terminations makes an intelligent reply difficult.[32] Not only are the reasons given often in-

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[30] A recent study has established that only 57% of the mothers on welfare in New York City had attended high school at all; that only 1 of 6 had graduated; and that 1 of 6 had not even gone beyond fourth grade. See I. Cox, Families on Welfare in New York City, 6 Welfare in Review 22, 24 (1968).

[31] See pp. 12a-13a supra.

[32] The charge of "failure to comply with Department resource policy" made to intervenor-plaintiff Sidor, for example, is virtually impossible to disprove without further information.

comprehensibly vague, but additional or wholly different reasons may in fact be behind the decision to terminate.[33] A personal hearing is necessary, if the recipient wishes it, both to explain to him the nature of the charges against him and to inform him of the evidence on which they are based. Indeed, the next most glaring deficiency of option (b) is its failure to require disclosure of the recipient of the real basis of the case against him. It merely provides for notice of proposed discontinuance "together with the reasons for the intended action." This procedure clearly falls far short of giving the recipient sufficient notice of the case against him so that he may ascertain its basis and contest it effectively. In Willner v. Committee on Character and Fitness, 373 U. S. 96, 107 (1963), the concurring opinion of Justices Goldberg, Brennan and Stewart states:

> The constitutional requirements in this context may be simply stated: in all cases in which admission to the bar is to be denied on the basis of character, the applicant, at some stage of the proceedings prior to such denial, must be adequately informed of the nature of the evidence against him and be accorded an adequate opportunity to rebut this evidence.

At least seven, if not all,[34] of the Justices agreed with this statement.

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[33] The cryptic notice given intervenor-plaintiff Soto, for example, was "failure to attend rehabilitation C.O.C." The decision of the review officer, however, refers to quite different reasons—that Mr. Soto took drugs, was reported to be "a parasite" and "playing a game," and had frequently failed to cooperate.

[34] The dissenting opinion (Harlan, J., joined in by Clark, J.) held that the petition for certiorari should have been dismissed as improvidently granted, but characterized as "questionable" any holding that "an applicant for membership in the New York Bar

The stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great, to allow termination of aid without giving the recipient a chance, if he so desires, to be fully informed of the case against him so that he may contest its basis and produce evidence in rebuttal.[35] Moreover, in some instances at least, he must be permitted to meet the evidence against him by having questions put to the source of that evidence. There have been cited to us too many case histories in which welfare recipients have allegedly been cut off on the basis of untrue rumors and reports, as with Mrs. Velez, discussed above. We do not hold that the welfare recipient about to be terminated must be accorded the opportunity for confrontation and cross-examination in a formal manner, with the full panoply of a trial-type hearing, including testimony under oath. The right to face those providing harmful information and have them interrogated may be substantially achieved in an informal way, and we use the term "cross-examination" here in that less formal sense. Moreover, we are aware that such a requirement is time-consuming and if applied indiscriminately in every case might unduly delay administration of the entire welfare system. There will undoubtedly be many cases—perhaps a great many—in which the material relied upon by the welfare agency "appears from information supplied or con-

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may be denied admission without having had the opportunity at any stage to confront persons whose unfavorable information may have led the Character Committee to refuse to certify the candidate's 'character and fitness.'" 373 U. S. at 110.

[35] See Bratton v. Chandler, 260 U. S. 110 (1922); Gonzales v. United States, 348 U. S. 407, 415 (1955); Dixon v. Alabama State Bd. of Educ., 294 F. 2d 150, 159 (5th Cir.) cert. denied, 368 U. S. 930 (1961); Parker v. Lester, 227 F. 2d 708, 716-17 (9th Cir. 1955).

firmed by the applicant himself, or is of an undisputed documentary character disclosed to the applicant . . . ." Willner v. Committee on Character and Fitness, 373 U. S. 96, 108 (1963) (concurring opinion).[36] But where termination of benefits "depends upon information supplied by a particular person whose reliability or veracity is brought into question by the applicant, confrontation and the right of cross-examination should be afforded." Id.[37] It may be that something less would be appropriate in such a case if the welfare authorities could show an important interest in secrecy, cf. McCray v. Illinois, 386 U. S. 300 (1967), but no such interest has been demonstrated in any of the cases before us. We assume that any such situation would be the rare exception to be justified on the particular facts involved. We do not suggest that a "tip" or other confidential information may not properly trigger an investigation of a welfare recipient's eligibility. We hold only that when the decision is made to terminate benefits, the recipient must be afforded an opportunity to learn the evidence against him which the investigation turned up, if it was a basis of that decision, and when the value of that evidence turns upon a person's credibility, the recipient

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[36] Intervenor-plaintiff Fuentes, for instance, was given notice of termination because "You have a large sum of money in the bank for which you were unable to give a satisfactory explanation." In such a case, an official statement from the bank would ordinarily be adequate to support the agency's claim. Again, the issue may be simply the proper application of agency regulations to an undisputed factual situation.

[37] See Greene v. McElroy, 360 U. S. 474, 496-97 (1959); Gonzalez v. Freeman, 334 F. 2d 570, 578-80 (D. C. Cir. 1964); Hornsby v. Allen, 326 F. 2d 605, 608 (5th Cir. 1964); Rios v. Hackney, CA 2—1852 (N. D. Texas, Nov. 30, 1967). But cf. Brown v. Gamage, 377 F. 2d 154 (D. C. Cir.), cert. denied, 389 U. S. 858 (1967), criticized in 20 Stan. L. Rev. 360 (1968).

must have the opportunity to test it as set forth above. We realize that these requirements will duplicate the "fair hearing" post-termination procedure to some extent. However, any pre-termination hearing—even the type already put into effect by the state—also does that. Undue duplication is of course regrettable. However, we regard the informal conference envisioned here as quite different from a full-fledged trial-type post-termination "fair hearing" with testimony given under oath. In any event, in light of the shattering effect of wrongful termination of benefits upon a recipient, we believe that the procedures called for here are minimum requirements of due process.

Accordingly, therefore, we conclude that option (b) is constitutionally inadequate and that plaintiff's application for a preliminary injunction against the use of the option in New York City must be granted. However, because argument has also been addressed to the legal sufficiency of the provisions of option (a) and because New York will be faced under our ruling with the need to substitute for option (b), we feel it is our obligation also to consider the constitutionality of procedures under option (a).

That option states that the notice of proposed termination shall advise the recipient that if he makes a request for review he will be afforded:

> opportunity to present such written and oral relevant evidence and reasons as the recipient may have to demonstrate why his grant should not be discontinued or suspended, . . .

and at such a review, the designated welfare official shall:

> review with the recipient and his representative, if any, the evidence and reasons supporting the proposed ac-

> tion and shall thereupon afford the recipient opportunity to present relevant evidence and to state reasons why the proposed discontinuance or suspension should not be made.[38]

This language makes clear that option (a) does not suffer from some of the obvious inadequacies of option (b). Thus, option (a) does provide for a hearing in person, and, fairly construed, for disclosure to the recipient of the evidence against him. It is not clear whether the source of the evidence must be identified and the recipient thereafter given the right, in an appropriate case, to confront a person so disclosed and have him questioned. The regulation's silence on this point, when compared with the specificity of the state hearing procedure provided after termination,[39] might indicate that the recipient is denied such right. We have already ruled that this would be constitutionally invalid. Therefore, unless option (a) is construed to afford a recipient such right in an appropriate case, the procedure is improper. But in view of the newness of the regulation and the paucity of information given us on its use outside of New York City, we will not assume at this time that the right will be denied.

Plaintiffs have other objections to option (a), but to the extent that they have not already been dealt with, they do not require extensive discussion.[40] Implicit in what

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[38] See note 7 supra.

[39] "Each party has a right to be represented by counsel, or other representative, to testify, to produce witnesses to testify, to offer documentary evidence, to cross-examine opposing witnesses, to offer evidence in rebuttal and to examine any documentary evidence offered by the other party." 18 NYCRR 84.13(c).

[40] HEW is apparently seeking clarification at this time from the New York Welfare Department on the grounds that the New

we have already said is the requirement that the decision of the reviewing official must be based solely on evidence before him which has been made available to the recipient, except in the rare instance already discussed when there is an important interest in secrecy.[41] An objection is made to the notice requirement, but it is not persuasive. Option (a) requires notice in writing "at least 7 days prior to the proposed effective date of the discontinuance." We construe this to mean that the notice must be mailed at least seven days before such effective date. If so mailed, the notice is adequate.

The final objection to option (a) as written is that the welfare official reviewing the proposed termination of benefits is not impartial. Option (a) provides that:

> Only the social services official or an employee of his social services department who occupies a position superior to that of the supervisor who approved the proposed discontinuance or suspension shall be designated to make such a review.

This is obviously an attempt to have "review" of a supervisor's decision to terminate by someone more disinterested than he is. Since the review, however, is by another employee of the welfare agency, there is a possibility that the reviewing official will have had some prior official contact with the case. However, we are unable to say that the possible involvement of that official in aspects of a case

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York prior review procedure is not expressly available in cases of reduction of benefits as well as termination, as is required by the Handbook, Part IV, §2300(d)(5) (1968). Since plaintiffs have not raised this issue, we do not consider it here.

[41] See p. 24a supra.

prior to the review of proposed termination necessarily disqualifies him from conducting a fair hearing. Some degree of previous familiarity and informal contact with a case by a hearing officer is a common phenomenon in many administrative agencies. That the review officer is familiar with, or even has formulated opinions about, the facts of a case prior to review is not in itself sufficient to disqualify him.[42] However, plaintiffs argue that this reviewing officer is in practice frequently a case supervisor who has been consulted in advance for approval of proposed terminations and may even have initiated the recommendation to terminate. We would regard such a practice as a clear violation of the spirit of the requirement that the reviewing officer be superior to "the supervisor who approved the proposed discontinuance." In other words, the regulation meets the requirement of a fair hearing, but we expect the welfare department to enforce it strictly.[43]

In addition to their allegations of the insufficiency of the New York hearing procedures on their face, plaintiffs complain that the regulations themselves are frequently disregarded or improperly applied. They have offered evidence showing, for instance, that the notice often is not sent out within seven days of the proposed termination or before termination at all, that notices fail to state the full or real reasons for proposed termination, and that the

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[42] See NLRB v. Donnelly Garment Co., 330 U. S. 219, 236-37 (1947): "We find no warrant for imposing upon administrative agencies a stiffer rule, whereby examiners would be disentitled to sit because they ruled strongly against a party in the first hearing." See also Pangburn v. CAB, 311 F. 2d 349, 356-58 (1st Cir. 1962); 2 K. Davis, Administrative Law Treatise ¶12.06, at 169 (1958); W. Gellhorn & C. Byse, Administrative Law 944-45 (4th ed. 1960).

[43] We also assume that a case supervisor who has become too deeply involved in a case conscientiously to undertake an impartial review can and will disqualify himself from that function.

review decision is frequently delayed unduly. We recognize that the transition to a new system of procedures, especially in an agency as large as the New York City Welfare Department, is not an easy task, and that it necessarily takes time to achieve full and smooth operation. Moreover, we are confident that the agency will make every effort in the future to insure that its own regulations and the requirements outlined in this opinion are carefully observed in practice. Finally, we are well aware that proceedings to compel state officials to comply with their statutory or regulatory duties should usually be brought in state courts,[*] and that supervision of a state administrative program is ordinarily an inappropriate role for a three-judge federal court. In view of all of these considerations and the fact that the plaintiffs before us are obtaining an injunction against use of option (b), the procedure which has been applicable to their terminations up to now, we will not now deal with these issues further.

V.

With this disposition of the case, it is unnecessary to rule on plaintiffs' remaining statutory argument that by providing two options throughout the state for pretermination procedure, the state violates the requirement of 42 U. S. C. §602(a)(1), that its plan, in effect, be uniform in the state. Apparently, defendants do not press before us various other arguments originally made before Judge Bryan, such as plaintiffs' need to exhaust available remedies administratively, or that the case is moot be-

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[*] For instance, in an Article 78 proceeding in New York, N. Y. C. P. L. R. §§7801-06.

cause most plaintiffs are now receiving public assistance on an emergency basis, or that a three-judge court is inappropriate here. Judge Bryan rejected these arguments in his opinion convening the three-judge court. —— F. Supp. at ——.

As to the first argument, see King v. Smith, 392 U. S. 309, 312 n. 4 (1968). As to the second argument, the only development since Judge Bryan's decision is that some of these plaintiffs have received their post-termination state fair hearings. However, that this right was finally accorded to them months after their complaint was filed and after termination of benefits does not dispose of the case. Other plaintiffs are still threatened with termination without a proper hearing, and if we were required to do so, we would regard this as a class action, as plaintiffs request, as was done in Wheeler v. Montgomery, No. 48303 (N. D. Cal. April 17, 1968), appeal docketed, 37 U. S. L. W. 3152 (U. S. Oct. 22, 1968) (No. 634), relied on by defendants. Finally, Judge Bryan properly convened the three-judge court. The complaint obviously raised substantial constitutional issues. In addition, while option (b) may thus far have actually been in effect only in New York City, any or all local agencies could adopt it; it is thus validly a regulation of "general and state wide application." Moody v. Flowers, 387 U. S. 97, 101 (1967).

Finally, we emphasize again that we deal here only with procedural rights, not with whether a particular recipient of welfare is entitled to receive it. We are most aware that abuses of the welfare system do exist, and we do not minimize the need to keep welfare expense within manageable bounds. We do not suggest that welfare payments should be made to anyone not entitled to receive them. We

hold only that a welfare recipient is entitled to certain minimum procedural protections before his payments are cut off or diminished. Providing those protections will, of course, help to insure fair individual treatment. In addition, it will have the more subtle, but equally important, effect of demonstrating that fair procedures are available, thus protecting the rule of law in society, a not insignificant result.[48]

To sum up: We hold that a pre-termination hearing for welfare recipients is constitutionally required and that the procedures set forth above for such hearing are the constitutional minimum. Accordingly, we deny defendants' motion for summary judgment; we grant plaintiffs' motion for a preliminary injunction as to the operation of option (b), and deny it as to option (a), for the reasons and on the conditions stated herein. In addition, nothing herein is meant to affect the right to a post-termination hearing in accordance with the procedures already in existence. Plaintiffs also moved to dissolve an order of Judge Bryan's staying discovery pending disposition of the motions in chief. Since that discovery was primarily designed to prove that the various hearing procedures, even if constitutional on their face, were unconstitutional in their application, for the reasons already set forth we deny it. Plaintiffs' motion to amend the complaint in the consolidated case is granted, as is the motion of the twelve intervenors to intervene.

---

[48] See E. Wickenden, Administration of Welfare Rights, in National Conference on Law and Poverty, Proceedings 31, 36-37 (1965).

Settle order on notice; if defendants desire a stay pending appellate review, their proposed order should so provide.

/s/ WILFRED FEINBERG
U. S. C. J.

/s/ FREDERICK vP. BRYAN
U. S. D. J.

/s/ EDWARD C. McLEAN
U. S. D. J.

Dated: New York, N. Y.
November 26, 1968

APPENDIX B

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Social and Rehabilitation Service

[45 CFR Ch. 11]

FAIR HEARINGS—PUBLIC ASSISTANCE PROGRAMS

Legal Services for Appellants; Continuing Assistance During Appeals

Notice is hereby given that the regulations set forth in tentative form below are proposed by the Administrator, Social and Rehabilitation Service, with the approval of the Secretary of Health, Education, and Welfare. The proposed regulations relate to public assistance State plan requirements concerning continuation of assistance during a period of appeal and availability of legal services to appellants in fair hearings.

Prior to the adoption of the proposed regulations, consideration will be given to any comments, suggestions, or objections thereto which are submitted in writing to the Administrator, Social and Rehabilitation Service, Department of Health, Education, and Welfare, 330 Independence Avenue SW., Washington, D.C. 20201, within a period of 30 days from the date of publication of this notice in the FEDERAL REGISTER.

The proposed regulations are to be issued under the authority contained in section 1102 of the Social Security Act, 42 U. S. C. 1302.

Dated: October 30, 1968.

MARY E. SWITZER,
Administrator, Social and Rehabilitation Service.

Approved: November 26, 1968.

WILBUR J. COHEN,
Secretary.

Subject. Fair Hearings—Legal Services; Continuing Assistance.

Purpose. To implement policy requiring a State to continue assistance to recipients whose cases are being appealed and to make legal services available to appellants in fair hearings.

State plan requirements. Effective July 1, 1969, a State plan for OAA, AFDC, AB, APTD, AABD, or MA must provide that:

When a fair hearing is requested because of termination or reduction of assistance, involving an issue of fact, or of judgment relating to the individual case, between the agency and the appellant, assistance will be continued during the period of the appeal and through the end of the month in which the final decision on the fair hearing is reached. (If assistance has been terminated prior to timely request for fair hearing, assistance will be reinstated.) Where delays are occasioned during the period of the appeal, assistance will be continued if the delay is at the in-

stance of the agency or because of illness of the claimant or for other essential reasons. To the extent that there are other delays at the request of the claimant the agency may but is not required to continue assistance.

The services of lawyers will be made available to welfare clients who desire them in fair hearings. This may be done through legal service projects under the Office of Economic Opportunity, Legal Aid, or other organizations making legal services available; or through enabling the appellant to engage an attorney or be assigned an attorney in accordance with the procedures of the local Bar Association. Appropriate fee schedules are established or other methods are developed to assure legal representation when desired. Attorneys on the staff of the welfare agency may not be used to represent the claimant at fair hearings. States are not required to pay to the extent that adequate services are available without cost to the State agency.

Federal financial participation. Federal financial participation is available in:

Cost for services of lawyers, under the adult categories to represent welfare clients in fair hearings, at the 75-percent rate, if the State has an approved services plan for the adult categories. The 50-percent rate would be applicable if the State has no approved plan for services in the adult categories.

Cost for services of lawyers, under title IV, part A, to represent clients in fair hearings, at the 85-percent rate to July 1, 1969, and at the 75-percent rate thereafter.

Cost for legal services at the applicable rate for clients pursuing judicial review of a fair hearing decision.

[F.R. Doc. 68-14359; Filed, Nov. 29, 1968; 8:47 a.m.]

—Federal Register, Saturday, November 30, 1968. Vol. 33, pp. 17853-17854.

APPENDIX C

STATE OF CALIFORNIA — DEPARTMENT OF SOCIAL WELFARE

NOTICE OF ACTION

DEPARTMENT OF SOCIAL SERVICES
585 PUSH STREET
SAN FRANCISCO, CALIFORNIA 94108

STATE NO.
COUNTY NO.
TYPE OF AID:
DATE:

Dear

Your Warrant (Check) has been withheld

effective because

☐ of probable ineligibility due to:
- ☐ Excess income
- ☐ Excess property
- ☐ Change in living arrangement
- ☐ Other (Specify)

☐ A current or prior overpayment has to be adjusted.
☐ We need the following information to complete this investigation:

It is not necessary for you to see us about this notice unless there are facts relating to your needs and/or income or facts which may otherwise affect your eligibility that you have not reported to us. If you have a question about this action and wish to discuss it, please telephone or write to us. We will answer your question or make an appointment to see you in person. I will be available to discuss the above problem with you at ☐ 150 Otis St. - ☐ 1360 Mission St. in _____, or you may

Sincerely,

phone 558 (Date)

(Telephone Number) Social Worker (Unit No.)

Medical Assistance for the month of _____
- ☐ Will continue
- ☐ Will not continue

Every effort is being made to complete the investigation promptly. The withheld warrant will be delivered as soon as there is eligibility to receive it.

[redacted], Canceled or Unclaimed Aid Payments, Intra-program Data Change, and Supplemental Payments)

Form AG-LD 239A (5-65) (OVER)

IMPORTANT INFORMATION

If you have any questions or you desire further information:

1. You may get in touch with your social worker who will be glad to discuss any questions with you. All facts and any further information you wish to present will be given careful consideration. If an adjustment is in order, it will be made.

2. You may inform the State Department of Social Welfare if you have a complaint by going in person or writing to that office. The department will then notify the County Welfare Department. Upon receipt of such notification the County Welfare Department will review the facts in your case. If they determine that you are entitled to an adjustment, it may be possible to settle your complaint without further action on your part.

3. You may request a fair hearing and a decision by the Director of the State Department of Social Welfare. Such request must be in writing. A letter is sufficient but you must state that you want a hearing and tell why you are dissatisfied. A request for a hearing should be sent to the area office of the State Department of Social Welfare nearest your home. Area offices of the State Department of Social Welfare are located at:

   Los Angeles--State Office Bldg. No. 2, 107 S. Broadway, Los Angeles, California 90012

   Sacramento—2415 First Avenue, P.O. Box 8074, Sacramento, California 95818

   San Francisco—1407 Market Street, San Francisco, California 94103

A request for a hearing, to be considered, must be received by the State Department of Social Welfare within one year of the postmarked date of the notice of action you are dissatisfied with.

APPENDIX D

The City of New York

DEPARTMENT OF SOCIAL SERVICES
Center: SPECIAL SERVICES
Address: 119 West 31st Street
New York, New York 10019

NOTICE OF INTENT TO SUSPEND OR DISCONTINUE PUBLIC ASSISTANCE
(Prepare in triplicate)

Case Number

Dear .

This is to advise you that this Department intends to ☐ SUSPEND ☑ DISCONTINUE your public assistance grant on 11/8/68, for the following reasons:

REFUSAL TO COOPERATE WITH DEPARTMENT POLICY.

If you feel that your public assistance grant should not be suspended or discontinued, you may request a review of your record by a Review Officer on or before [redacted] 11/8/68. You may also submit any statement or document which may establish your need for public assistance. You have the right to submit this written material through an attorney or any representative of your choosing.

If you wish a review, please mark an X in Box No. 1, below. If you do not wish a review, please mark an X in Box No. 2, below. If you fail to reply, we will assume that you agree with the action the Department proposes to take.

Box No.1: ☐ I REQUEST A REVIEW Box No.2: ☐ I DO NOT REQUEST A REVIEW

Please return a copy of this letter in the enclosed self-addressed envelope and keep the other copy of this letter for your records.

If, after this review, you are still dissatisfied with the decision given you, you may request a Fair Hearing, in writing or orally, by communicating with the State Department of Social Services at 270 Broadway, New York, N.Y. 10007, Telephone Number 488-6550.

11/1/68

Date Caseload No.

FILE COPY

FILED
JUN 30 1969
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM 1968

No. ~~684~~ 14

MAE WHEELER, et al.,
Appellants,

vs.

JOHN MONTGOMERY, et al.,
Respondents.

On Appeal from the United States District Court
for the Northern District of California

Amicus Curiae Brief on Behalf of Appellants

THOMAS L. FIKE
THOMAS SCHNEIDER
BURTON DANZIGER
DAVID NAWI

1815 Telegraph Avenue
Oakland, California 94612

Attorneys for Amicus Curiae,
Legal Aid Society of
Alameda County

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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In the Supreme Court of the United States

OCTOBER TERM 1968

No. 634

MAE WHEELER, et al.,
Appellants,

vs.

JOHN MONTGOMERY, et al.,
Respondents.

On Appeal from the United States District Court for the Northern District of California

Amicus Curiae Brief on Behalf of Appellants

INTEREST OF AMICUS CURIAE, LEGAL AID SOCIETY OF ALAMEDA COUNTY

The Legal Aid Society of Alameda County is a non profit California corporation established in 1929 for the purpose of furnishing legal services to those residents of Alameda County who are unable to afford the services of private attorneys. Staff attorneys of the Society have training and experience in Welfare law. They are currently representing plaintiffs and respondents in *McCullough v. Terzian,*[1] a

1. The record on appeal in *McCullough v. Terzian,* consisting of a "Clerk's Transcript on Appeal", has been lodged with the Clerk of this court. References to "C.T." in this brief are references to said "Clerk's Transcript". Since this is an amicus curiae brief, the facts of the *McCullough* case are not before this Court, and it was thought unnecessary to file a formal record of the California State Court proceedings.

case now pending in the Court of Appeal of the State of California, First Appellate District, Division Three, 1 Civil No. 25830. At issue in that case is the validity with respect to California statutes and the California and United States Constitutions of the identical regulation passed on by the three judge court below and at issue herein, State Department of Social Welfare Public Social Service Manual 44-325.43 (hereinafter referred to as PSS 44-325.43).

McCullough is a class action in which plaintiffs and respondents represent all persons receiving public assistance under the categorical aid programs in the State of California. Defendants and appellants are HRAYR TERZIAN, Director of the Alameda County Welfare Department, and JOHN MONTGOMERY, Director of the Department of Social Welfare of the State of California. Respondent MONTGOMERY was a defendant in the three-judge court below and is a respondent in the instant appeal.

The trial court in *McCullough* rendered judgment in favor of plaintiffs, which judgment declared PSS 44-325.43 invalid "because and to the extent it does not provide a hearing with adequate procedural safeguards . . . prior to the withdrawal or termination of public assistance benefits under the [categorical aid] programs as required by State law and the United States and California Constitutions." (C.T. 103:29-104:6)* The judgment further ordered defendant MONTGOMERY to provide categorical aid benefits to which recipients are otherwise entitled "until a decision, if any, of ineligibility is rendered" pursuant to the State "fair hearing" or its equivalent.

Plaintiffs in *McCullough* have a direct interest in the outcome of this litigation. Their claim, (and the decision of the State Trial Court) is based in part on the contention

*See footnote 1, p. 1, supra.

that PSS 44-325.43 violates due process requirements of the Fourteenth Amendment of the United States Constitution, which is the very issue presented in the instant case. This Court's decision on the scope of Fourteenth Amendment due process will provide a minimum standard below which no state's law, whether decisional or statutory, may fall. Furthermore, amicus has carefully studied the California law as it bears on the sufficiency of the procedures at issue in the instant case, and has concluded that the State law, as well as federal, compels a reversal of the judgment of the District Court.

With the consent of both parties pursuant to Rule 42 of the Supreme Court Rules, Legal Aid Society of Alameda County respectfully submits its Amicus Curiae brief in support of appellants.

SUMMARY OF ARGUMENT

The District Court has upheld a regulation (PSS 44-325.43, reproduced in Appendix A) which prescribes the procedure followed in California before welfare benefits are withdrawn or withheld. The regulation applies only to recipients of the "categorical aids," Aid to Families with Dependent Children (AFDC), Aid to the Blind (AB), Aid to the Disabled (ATD), and Old Age Assistance (OAS).

The regulation requires notice to the recipient, in writing, immediately after a decison is made to withhold aid and in no case later than three days before aid is actually withheld. It further provides that the affected recipient will be given an opportunity within the three days to meet with a caseworker or other unspecified person to learn the nature and extent of the information upon which the withholding action is based, to provide an explanation, and to "discuss the matter informally for purposes of clarification and, where possible, resolution."

It does not provide adequate time to marshall or present contradicting evidence; it does not provide for the subpoena and cross-examination of witnesses; it does not provide for a review of the evidence by a clearly designated and impartial trier of fact; and it does not provide for a decision on the merits based solely on the record. In short it contains none of the procedural safeguards expressly included in the subsequent "fair hearing" (Calif. Welfare and Institutions Code §§ 10950-10965 hereafter, W & I Code) proceedings and generally contemplated by the requirement of a hearing.

It is uncontroverted that the constitutional adequacy of a "hearing" depends on the nature of the governmental function as well as the nature of the private interest involved. *Cafeteria and Restaurant Workers Union v. McElroy* (1961) 367 U.S. 886; *Sokol v. Public Utilities Commission* (1966) 65 C.2d 247, 418 P.2d 265.

The District Court opinion is based on the assumption that the obvious procedural inadequacies of the regulation (and the error and hardship which necessarily flow therefrom) are justified by the availability of a subsequent hearing at the state level after termination of benefits by the County (the fair hearing) and the competing public interest of time and expediency.

Amicus contends that notwithstanding the availability of a subsequent hearing due process requires an adequate hearing prior to the time official action takes effect. An adequate hearing is one that preserves all the elements of an adjudicatory proceeding unless there is a compelling public interest that requires the omission of one or more elements of such a hearing. Further, common sense dictates that where one element of judicial practice is omitted from administra-

tive adjudication, compensating safeguards are all the more necessary. The challenged regulation, however, far from compensating for procedural deficiencies, compounds them, by eliminating nearly all of them. It provides an informal proceeding appropriate for ordinary social worker-client relationships, but totally inappropriate when the client and the welfare department have become adversaries. Welfare aid is usually withheld or terminated because of changed circumstances about which there is no disagreement. Relevant here, however, are those cases in which the recipient denies an alleged change of circumstances. This is usually no mere misunderstanding that can be cleared up by informal conferences among people of good will with common interests. It is a dispute about facts, the resolution of which has the profoundest consequence for the recipient. The traditional procedures that have developed in our courts are still the best way, and the only constitutional way, to assure justice to all parties in adversary positions.

The following pages argue that the state has shown no such compelling public necessity as would justify the procedural inadequacies of the challenged regulation. In the *McCullough** case, in a motion before the California Court of Appeal, California's Attorney General has expressly stated that costs are not in issue. (See Appendix C.) Other public interests, such as administrative convenience, are hardly "compelling".

The argument continues to show that three days notice provided for by the challenged regulation is insufficient to permit a recipient to prepare his case; that without subpoena power, and without the right of confrontation and cross-

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*See footnote 1, p. 1, supra, and text thereto.

examination, a hearing is not an adjudicatory procedure, but only a tool of discovery; that without a record, the person who decides must decide on the basis of matters outside the record and may decide on a version of the evidence different from that which the recipient confronted; that the unnamed person in the welfare department who must decide is likely to be partial, not impartial; and that in permitting discontinuance of aid on the ground of "probable ineligibility" rather than "ineligibility" California authorizes a drastic result on vague and inadequate grounds.

Lastly, this brief argues that the California statute and case law may require even greater protection for the recipient than the United States Constitution, and, *a priori*, can require no less. The California Welfare and Institutions Code permits aid to be cancelled, suspended or revoked only "for cause" or "after investigation." Previous California interpretations of analogous language show that such language requires a hearing with *all* the usual procedural safeguards the word implies.

ARGUMENT

I. The Notice and Informal Conference Provided by the Challenged Regulation Prior to Termination of Benefits by a County Welfare Department Do Not Afford the Protections Required by Due Process.

The District Court held that the informal conference prescribed by PSS 44-325.43 is a constitutionally adequate "hearing" prior to termination of benefits, in the light of subsequent "fair hearing" requirements. This decision not only conflicts with the decision in *Kelly v. Wyman* (S.D. N.Y. 1968) 294 F. Supp. 893, probable jurisdiction noted, sub. nom *Goldberg v. Kelly*, 37 LW 3399, but with basic constitutional principles.

An erroneous decision to terminate aid to a welfare recipient is disastrous to the individuals affected. Under California Welfare and Institutions Code (hereinafter referred to as W. & I. Code) Sections 10950 et seq. the review of such a decision does not stay its effect, and the review takes two months or longer. Since most recipients are under an incapacity which prevents them from supporting themselves (e.g. blindness, old age, infancy or medical disability) they will not have minimum subsistence for this period. The existence of a hearing subsequent to termination, therefore, affects neither the importance of the prior decision nor its basic adjudicatory character.

As a general rule, due process requires that such a decision be made in accordance with "procedures which have traditionally been associated with the judicial process." *Hannah v. Larche* (1960) 363 U.S. 420, 442. These procedures have been held to include adequate notice, *Russell-Newman Manufacturing Co. v. N.L.R.B.* (1966) 370 F.2d 980; see, *Hornsby v. Allen* (1964) 326 F.2d 605, 608; the right to confrontation and cross-examination, *Greene v. McElroy* (1959) 360 U.S. 474; *Willner v. Committee on Character and Fitness* (1963) 373 U.S. 96; a decision based on evidence produced at a hearing, *Ohio Bell Telephone Co. v. P.U.C.* (1936) 301 U.S. 292; *English v. City of Long Beach* (1950) 35 C.2d 155, 217 P.2d 22; an impartial trier of fact, *Wasson v. Trowbridge* (1967) 382 F.2d 807; *In re Murchison* (1955) 349 U.S. 133; and a decision on the merits, *Endler v. Schutzbank* (1968) 68 C.2d 162, 436 P.2d 297.

Occasionally, where there is a compelling public interest involved, one or more of these elements may be constitutionally omitted. Absent considerations of compelling public necessity, however, due process requires the preservation of all the elements of an adjudicatory proceeding

necessary for the protection of the interests affected. *Cafeteria and Restaurant Workers v. McElroy* (1961) 367 U.S. 886; *Sokol v. Public Utilities Commission* (1966) 65 C.2d 247, 418 P.2d 265; *Dixon v. Alabama State Board of Education* (5 Cir. 1961) 294 F.2d 150. As is shown immediately below, there is no compelling public interest or other justification for the procedural inadequacies of the regulation. Thus, the hearing preceding the termination of aid to a welfare recipient must preserve all the traditional elements of the adjudicatory process. The regulation preserves none.

A. THERE IS NO COMPELLING PUBLIC NECESSITY OR OTHER JUSTIFICATION FOR THE PROCEDURAL INADEQUACIES OF THE REGULATION.

The District Court does not specify what public interest it relies on to justify the obvious procedural deficiencies in the regulation. Mere administrative inconvenience to the state or counties, certainly, cannot justify the sacrifice of safeguards required by due process. *Ohio Bell Telephone Company v. Public Utilities Com.* (1937) 301 U.S. 292, 304-305; *Endler v. Schutzbank* (1968) 68 C.2d 162, 180, 436 P.2d 297. Since adequate hearings are already provided after action is taken, it can hardly be claimed that the provision of such hearings prior to action would impair the ability of the state and county departments from carrying out the functions for which they are responsible.

Perhaps of ultimate concern to the State is the question of cost.[2] By providing for an *ex parte* determination of

2. In the case of *McCullough v. Terzian*, in the California Court of Appeal, the Attorney General of California filed a memorandum (Appendix C) opposing the introduction of additional evidence in that court, stating that "cost to the State has not been put in issue." The additional evidence offered was admittedly incomplete but tended to show that costs to the State resulting from the State-wide order of the trial court was not significant.

probable ineligibility without any provision for contesting that determination on its merits in a meaningful hearing prior to the withdrawal of benefits, the State Department of Social Welfare is obviously attempting to minimize the cost of paying welfare benefits to persons who may not in fact be eligible. In so doing they have apparently determined that it is more important to protect the public purse than it is to protect the public reputation for justice. While it is of course important to preserve public funds, constitutional rights cannot be sacrificed in the process. *Edwards v. California* (1941) 314 U.S. 160.

Furthermore, the costs thus saved will not be great. Under the judgment of the California Superior Court in *McCullough*,* for example, the continued payment of benefits pending an adequate hearing is available only to a person who controverts the allegations of ineligibility in a sworn statement and requests a "fair hearing". Payment of benefits to these persons pending an adequate hearing causes the State no financial injury at all if the recipient is found eligible, since binding federal regulations require payment of aid retroactively to the date of discontinuance. Federal Handbook of Public Assistance Administration (Federal Handbook), Sections 6200 (k), 6300 (g). Furthermore, aid payments pending hearing are explicity sanctioned under regulations enacted pursuant to the Federal Social Security Act. (Federal Handbook, Section 6500 (b)). Under these circumstances, amicus submits that the regulation fails to provide a hearing "at a meaningful time and in a meaningful manner" which due process requires. *Armstrong v. Manzo* (1965) 380 U.S. 545, 552.

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*See footnote 1, p. 1, supra, and text thereto.

B. A DECISION TO TERMINATE CATEGORICAL AID BENEFITS IS AN ADJUDICATORY ACT, REQUIRING, AS A MINIMUM, ADEQUATE NOTICE, OPPORTUNITY FOR CONFRONTATION AND CROSS-EXAMINATION, A DECISION BASED ON EVIDENCE PRODUCED AT A HEARING, AN IMPARTIAL TRIER OF FACT, AND A DECISION ON THE MERITS. THE CHALLENGED REGULATION PROVIDES NONE OF THESE.

A decision to withdraw benefits must be based on a determination that a recipient previously found eligible for such benefits is no longer eligible. In contested cases, such a determination requires the resolution of disputed factual issues and the application of detailed statutory and regulatory criteria and is therefore an adjudicatory act. See *Hornsby* v. *Allen* (5 Cir. 1964) 326 F.2d 605, 608. It therefore requires the elementary safeguards which the challenged regulation fails to provide. 326 F.2d at 608.

1. The regulation fails to provide adequate notice.

It is elementary that due process requires notice of charges sufficiently in advance of hearing to permit adequate preparation for a hearing. *Russell-Newman Manufacturing Company* v. *N.L.R.B.* (5 Cir. 1966) 370 F.2d 980; see *Hornsby* v. *Allen*, (5 Cir. 1964) 326 F.2d 605.

PSS 44-325.43 provides that a recipient shall be notified of a decision to withhold categorial aid benefits and the grounds therefor at least three days before aid is actually withheld. It further provides that the recipient shall be informed of the evidence on which such a decision is based at an informal conference which is the recipient's sole opportunity to contest the county's action before it takes effect.

The evidence presented to the recipient for the first time at the conference may be overwhelming in detail and may be in a form so general or unorganized that it would be difficult to refute under any conditions. To do so immediately after first notice is often impossible. Even if the county's evidence is made available to the recipient prior

to the conference, three days is manifestly too short a time to permit adequate preparation. In this briefest of periods, the recipient who receives notice of proposed termination must gather and present evidence to rebut a report which professional investigators had a month or longer to prepare.[3] He is called upon to secure legal counsel, discover and evaluate the factual and legal grounds for the proposed termination, contact the county department to schedule an informal conference, interview adverse and favorable witnesses and arrange for their presence at the conference (without the benefit of subpoenas), and secure relevant documentary evidence, such as medical reports or wage records (again without the benefit of subpoena power). If all this is not adequately accomplished in a period as short as three days, there will be no chance of disturbing the *ex parte* determination of ineligibility and benefits will be withheld. In these circumstances the right to counsel is illusory.

The regulation involved in *Kelly* v. *Wyman* (S.D.N.Y. 1968) 294 F. Supp. 893, probable jurisdiction noted, *sub nom Goldberg* v. *Kelly,* (1969) 37 LW 3399, required *seven* days written notice prior to the proposed effective date of the discontinuance. The District Court in that case deemed such notice mailed seven days before effective date adequate. This is one of the most important distinctions between the New York and California regulations.

While three days may provide notice of proposed action, it clearly does not provide an adequate opportunity to con-

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3. The record in *McCullough* (see footnote 1, supra, p. 1) shows that the investigation by the District attorney's office of Mary McCullough's eligibility lasted at least 36 days. On February 15, 1968, the man alleged to be living with Mrs. McCullough was interviewed, C.T. 73, and the supplement summarizing the statements of two witnesses is dated March 21, 1968. C.T. 75. This length of time is not exceptional.

test the validity of that action. The California regulation provides a tool of discovery rather than an adjudicatory proceeding.

2. The regulation provides no opportunity to test the credibility and probative value of evidence.

Even if the regulation permitted adequate time to prepare for the conference, it would be constitutionally inadequate because its failure to provide subpoena power or the power to administer oaths deprives both the county and the affected recipient of any opportunity to test the credibility and probative value of the evidence on which a decision to terminate benefits is based.

Complex factual determinations, such as whether a husband and wife are disassociated or have abandoned a child, whether a man has lived with a woman in a spouse-like relationship, or whether a person is physically or psychologically unemployable, are a necessary element in many decisions to withhold public assistance benefits. Where, as here, such fact findings serve as a predicate for governmental action which seriously injures an individual, confrontation and cross-examination are an indispensable element of a hearing. *Greene* v. *McElroy* (1959) 360 U.S. 474, 507; *Willner* v. *Committee on Character and Fitness* (1963) 373 U.S. 96. See, *Walker* v. *City of San Gabriel* (1942) 20 C.2d 879, 129 P.2d 349.

Under the regulation, however, a determination of ineligibility must be made on the basis of evidence which is primarily hearsay, circumstantial and untested opinion. "[N]ot only is the testimony of absent witnesses allowed to stand without the probing questions of the person under attack which often uncover inconsistencies, lapses of recollection, and bias, but in addition, even [county personnel] do not see the informants or know their identities, but

normally rely on an investigator's report of what the informant said without even examining the investigator personally." *Greene v. McElroy* (1959) 360 U.S. 474, 497-499 (footnotes omitted). Without the ability to require the attendance of witnesses and to take sworn testimony, a trier of fact has no rational or adequate method of weighing conflicting testimony and therefore cannot render a meaningful decision.

1. The regulation fails to require a decision based on evidence produced at a hearing.

A decisional process which permits a determination to be made on the basis of evidence heard *ex parte* is manifestly inadequate to protect the affected party against arbitrary action. *Ohio Bell Telephone Co.* v. *P.U.C.* (1937) 301 U.S. 292. "[T]he requirement of a hearing necessarily contemplates a decision in light of evidence there introduced." *English* v. *City of Long Beach* (1950) 35 C.2d 155, 159, 217 P.2d 22, 24.

The regulation provides an opportunity for the recipient "to learn the nature and extent of the information on which the withholding action is based" and "to provide an explanation or information." However, it does not provide the recipient with the right to present any such explanation or information to the person or persons responsible for rendering the ultimate decision, nor does it require that a record of the evidence be made and transmitted to the decision maker. Presumably the substance of the county's evidence and the recipient's "explanation or information" must be communicated to the person who decides. This material may be transmitted in such a manner as to destroy its worth altogether. Elements may be omitted, distorted or colored in the retelling. The version that ultimately reaches the trier of fact may be incomplete or in-

accurate, and may be quite different from the version that confronted the recipient at the informal conference.

Under these circumstances the opportunity offered by the regulation to "provide an explanation" offers no meaningful opportunity to present evidence and cannot be deemed to satisfy due process. See, *I.C.C. v. Louisville & N. R. Co.* (1912) 227 U.S. 88, 91; *Dixon v. Alabama State Board of Education* (5 Cir. 1961) 294 F.2d 150.

4. The regulation fails to provide an impartial trier of fact.

Even if a recipient were afforded adequate notice and the right of confrontation and cross-examination, the failure of PSS 44-325.43 to require a decision by a person having no prior direct involvement in the case renders it inadequate to provide the protection required by due process.

It is too clear to require argument or extended citations that a fair hearing presupposes an impartial trier of fact and that prior official involvement renders impartiality most difficult to maintain. *Wasson* v. *Trowbridge* (1967) 382 F.2d 807, 813. Under the regulation, an affected recipient is entitled only to a conference with his caseworker or other unspecified county personnel who not only may have been involved in prior aspects of his case, but who may have actually made the initial recommendation to withhold benefits. The court in *Kelly* v. *Wyman, supra,* 294 F. Supp. 893, 906 construed a regulation which provided:

> "Only the social services official or an employee of his social services department who occupies a position superior to that of the supervisor who approved the proposed discontinuance or suspension shall be designated to make such a review."

The court said that, if in practice the reviewing official were a case supervisor who had been consulted in advance for

approval of proposed terminations or who might even have initiated the recommendation to terminate, it would be a clear violation of the spirit of the New York regulation. 294 F. Supp. at 907. The California regulation does not even attempt to require the decision maker to be a superior of the one who made the initial decision. It leaves the position of the decision maker completely unspecified. In fact, in relatively small county welfare departments there may be only one superior in the department, so that he will undoubtedly be the one who made the preliminary decision. Thus, the California regulation cannot be construed so as to be constitutional, unlike the New York regulation.

To illustrate the application of the California regulation, in the case of Mrs. McCullough (one of the plaintiffs in the California State Court action*), after receiving the investigation reports of the Family Support Division of the District Attorney's office, the social worker for Mrs. McCullough, along with her supervisor, determined that her continued eligibility for welfare benefits was conditioned on her admission that she was and had been living with a man whose income would have to be considered in determining her grant. C.T. 51-52. The social worker then visited Mrs. McCullough, discussed the investigator's report with her, and advised her that if she admitted that the man in question was living with her, her grant would be adjusted in accordance with his income, but that if she denied it, aid would be discontinued. Mrs. McCullough denied the allegation and two days later she was notified that her case was being discontinued, "because of failure to provide essential information". C.T. 52. Although she had the right, before termination became effective, to again discuss

*See footnote 1, p. 1, supra, and text thereto.

the matter with her social worker, there was no right to independent review by any person not previously connected with the case. Instead of initiating an impartial review of the facts, her denial terminated her right to further benefits. The "hearing" provided by the regulation is no more than the opportunity to dissuade a person who has already decided (and who may have a vested interest in supporting that decision). Impartiality and fairness under these circumstances may not only be difficult, but impossible to maintain.

5. The regulation fails to require a decision on the merits.

Finally, and perhaps most significantly, the regulation does not require a decision on the merits but permits the county to withhold benefits upon the receipt of evidence "which is both substantial in nature and reliable in source . . . indicating . . . *probable ineligibility*", PSS 44-325.421 (Emphasis added; set forth in Appendix A.)

Not only is it incumbent upon the county to withdraw benefits upon a determination of probable ineligibility but it is required to do so *as soon as possible.* PSS 44-325.1 (Set forth in Appendix A). Under these circumstances a county may withhold benefits without regard to the contradictory evidence offered by a recipient, thereby leaving the ultimate decision on the merits to the subsequent hearing conducted by the State Department of Social Welfare.

The only place in our system of justice where such a proceeding is deemed permissible is in the area of law enforcement or where the public health or safety is endangered. *Sokol v. Public Utilities Commission* (1966) 65 C.2d 247, 418 P.2d 265; *North American Cold Storage Company v. City of Chicago* (1908) 211 U.S. 306. Even in those circumstances there are a variety of devices available to prevent

or mitigate the injury which may flow from the necessity of taking governmental action before there has been a full hearing on the merits, such as bail, release on own recognizance, preliminary hearings, etc. There are no devices for mitigating the damage herein or for staying the governmental action and there is no threat to the public safety involved.

In light of the vital interest of public assistance recipients in an adequate hearing prior to withdrawal of benefits and of the absence of any significant interest of the County or State to the contrary, amicus submits that the termination procedures of PSS 44-325.43 are "inconsistent with rational justice, and [come] under the Constitution's condemnation of all arbitrary exercise of power." *I.C.C. v. Louisville & N. R. Co.* (1912) 227 U.S. 88, 91.

C. THE AVAILABILITY OF A SUBSEQUENT HEARING DOES NOT JUSTIFY THE ELIMINATION OF AN ADEQUATE PRIOR HEARING.

The District Court opinion implies that the procedural safeguards obviously omitted from the regulation are not constitutionally required prior to the termination of benefits because a fair hearing is available afterwards. The law is clearly to the contrary. Absent come compelling public interest, due process requires procedural safeguards adequate to protect the interest affected *prior* to action.

This Court most recently reaffirmed this proposition in *Sniadach v. Family Finance Corp.* (1969) ..... U.S. ....., 37 LW 4520.

Two California cases are likewise instructive on the necessity of a hearing prior to the time action takes effect, despite subsequent procedures. *Mendoza v. Small Claims Court* (1958) 49 C.2d 668, 321 P.2d 9; *Sokol v. Public Utilities Commission* (1966) 65 C.2d 247, 418 P.2d 265.

At issue in *Mendoza* was whether a month-to-month tenant could be deprived of possession pursuant to a small claims court judgment where there had been no right to counsel. The California Supreme Court unanimously held that he could not; and that therefore a statute vesting jurisdiction of unlawful detainer actions in small claims courts violated due process because it contained no provision for an automatic stay on appeal and the tenant could be dispossessed before the appeal was determined. The small claims hearing, which is an informal trial before a judge on adequate notice, California Code Civ. Proc., Sec. 117 et seq., was deemed inadequate to permit dispossession of the tenant despite the appeal right to a subsequent trial *de novo* with counsel.

In *Sokol* the interest of a telephone subscriber in avoiding a temporary interruption of service was at stake. The opinion held unconstitutional a regulation which permitted disconnection of telephone service on the basis of a police allegation that it was being used illegally and which provided a hearing only after service was terminated. The court stated that at a minimum, due process requires that an *ex parte* determination of probable cause be made by an impartial tribunal prior to disconnection, and that the subsequent hearing be promptly provided. 65 C.2d 247, 250, 418 P.2d 265, 271.

In the instant case, there can be no impairment of a vital government function, such as law enforcement, which was involved in *Sokol*. On the other hand, the interest of a categorical aid recipient in continued receipt of aid pending an adequate hearing is far greater than the interest in continuous telephone service and is at least as great as the interest of the tenant in possession. The inability of the wrongfully terminated categorical aid recipient to pay his

rent subjects him to an unlawful detainer suit to which he will have no defense, and to subsequent eviction. Calif. Code Civ. Proc., Sec. 1159 et seq. His inability to pay utility bills will result in disconnection of telephone, gas and electricity. Yet PSS 44-325.43 contains no provision under any circumstances for a stay of decision pending an adequate hearing, such as the California Legislature added to the statute after *Mendoza* to render it constitutional. Calif. Code Civ. Proc., Sec. 117 j (Calif. Stats. 1959, ch. 1982, p. 4588) Therefore, even when a recipient appeals in good faith, as evidenced by the filing of the sworn statement required by the judgment in *McCullough*,* the regulation permits termination of his aid after a so-called "hearing" which provides far less protection than a small claims trial before a judge, at issue in *Mendoza*, and which does not even afford the most elementary safeguard of an impartial tribunal which was required to protect a far less vital interest in *Sokol*.

So far as amicus can determine, no administrative agency has ever been permitted to terminate an interest comparable to that involved here under procedures so utterly lacking in elementary safeguards.† Even if there are considerations which permit the relaxation of one or more of the elements discussed above, (pp. 10-17), no case has been discovered which approves proceedings lacking all of these basic safeguards.

"For the guidance of the parties", the court in *Dixon v. Alabama State Board of Education* (5 Cir. 1961) 294 F.2d 150, 158, cert. den. 368 U.S. 930, set forth its views "on the

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*See footnote 1, p. 1, supra, and text thereto.

†Appendix B describes the rules of procedure governing proceedings which are used by a representative group of administrative agencies in acting to revoke or suspend a license or privilege granted to an individual.

nature of the notice and hearing required by due process *prior to expulsion from a state college or university.*" (Emphasis added). The views expressed were dictum and were expressly limited to the facts of the particular case. They are instructive however. The court specifically rejected the idea that "an informal interview with an administrative authority" was a sufficient hearing prior to expulsion. While it did not require a full trial-type hearing including the right to cross-examine witnesses, this was because "[s]uch a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college's educational atmosphere and impractical to carry out." 294 F.2d at 159.

It hardly needs to be stated that categorical aid recipients are not subject to the same disciplinary requirements as college students, (see *Parrish v. Civil Service Commission* (1966) 66 C.2d 260, 425 P.2d 223) and that an adequate hearing provided before termination of benefits will entail no disruption of the Welfare Department's functions. The receipt of categorical aid benefits pending a hearing cannot be dismissed as a lesser interest than attendance at a tax supported college.

On the other hand, considered essential by the *Dixon* court were: notice containing a statement of the specific charges and grounds, a report to the student including the names of all witnesses and the facts to which they testify, an opportunity to hear both sides in considerable detail including an opportunity to present a defense with oral testimony and written affidavits, and a report on the findings of the hearing. In short, the court suggests that the rudiments of an adversary system should be preserved as much as possible without encroaching upon the legitimate interest of the governmental agency involved.

It simply makes sense that where one element of judicial practice has been omitted from administrative adjudications, the provision of compensating safeguards is all the more necessary. *I.C.C. v. Louisville & N. R. Co.* (1912) 227 U.S. 88, 93; *Shively v. Stewart* (1966) 65 C.2d 475, 480, 421 P.2d 65.

It is sometimes suggested that welfare recipients are not entitled to the same due process as other more fortunate citizens because there is no constitutional right to receive such assistance.

Whether or not there exists a vested right to public assistance benefits, the requirements of procedural due process must be met before such benefits may be withdrawn. Courts have explicitly rejected the view that adequate procedural safeguards are required only when vested or constitutional rights are at stake and have required hearings to protect the interest of a student in remaining in a tax-supported university, *Dixon v. Alabama State Board of Education* (5 Cir. 1961) 294 F.2d 150, 156; *Goldberg v. Regents of the University of California* (1967) 248 C.A.2d 867, 57 Cal. Rptr. 463; the interest of an applicant for or holder of a business license; *Hornsby v. Allen* (5 Cir. 1964) 326 P.2d 605, 609; *Fascination Inc. v. Hoover* (1952) 39 C.2d 260, 269, 246 P.2d 656, 661; one's interest in employment, *Slochower v. Board of Education* (1956) 350 U.S. 551; *Greene v. McElroy* (1959) 360 U.S. 474; and one's interest in doing business with a government agency *Gonzalez v. Freeman* (D.C. Cir. 1964) 334 F.2d 570, 574. As the court stated in *Cafeteria and Restaurant Workers v. McElroy* (1961) 367 U.S. 886, 894, "One may not have a constitutional right to go to Baghdad, but the Government may not prohibit one from going there unless by means consonant with due process of law."

Under California law, categorical aid benefits must be administered promptly and humanely. W & I Code Sec. 10000. Due process requires no more. Although the fair hearing provided by the state to review county action may satisfy the requirement of statewide supervision, W & I Code Sec. 10600, it comes too late to satisfy the requirement of due process. The state is fully able to provide protection more meaningful than that provided under present practice. It can either require an adequate hearing on the county level or provide for a stay of the county's decision pending the state "fair hearing." It does neither, but instead permits benefits to be withdrawn after nothing more than a summary *ex parte* determination and an illusory opportunity to dissuade afterwards. It seeks to minimize costs rather than injustice. By so doing it can only further the alienation of society's most disadvantaged persons from their Government and the alienation of their Government from its founding principles. As stated by Jackson, J.:

> "Let it not be overlooked that due process of law is not for the sole benefit of an accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of Justice but which are bound to occur on ex parte consideration." Dissenting opinion, *Shaughnessy v. United States* (1953) 345 U.S. 206, 224-225.

II. The Notice and Informal Conference Provided by the Challenged Regulation Prior to Termination of Categorical Aid Benefits by a County Welfare Department Do Not Afford the Protection Required by the California Legislature.

California conceded in *McCullough** that the requirement of the W & I Code that benefits under the categorical aid

*See footnote 1, p. 1, supra, and text thereto.

program may be withdrawn "for cause"† carries with it the right to a hearing prior to actual withdrawal. (Appellant's Opening Brief, page 16) *Ratliff v. Lampton* (1948) 32 C.2d 226, 195 P.2d 792.

In *Ratliff*, the California Supreme Court held that a statute authorizing the Department of Motor Vehicles to revoke a driver's license for good cause carried with it the right to a hearing before the Department *prior* to revocation despite provision in the statute for a subsequent hearing before the Director of the Department. The decision rests on the rule, established in a series of prior cases, that where an agency is required by statute to act for cause, an affected party must be afforded a hearing prior to action unless there is a clear showing of a contrary legislative intent. *Carroll v. California Horse Racing Board* (1940) 16 C.2d 164, 105 P.2d 110 (suspension of horse trainer's license); *La Prade v. Department of Water and Power* (1945) 27 C.2d 47, 162 P.2d 13 (civil service discharge); *Covert v. State Board of Equalization* (1946) 29 C.2d 125, 173 P.2d 545 (liquor license revocation). The court in *Ratliff* stated:

> "The fact that the Vehicle Code provided for an administrative review subsequent to revocation does not alter this rule. We should not imply legislative intent to deprive a person of his license without a prior opportunity to be heard unless compelled to do so by the plain language of the statute, regardless of whether

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†The county must have cause to cancel, suspend or revoke aid in the Aid to Families with Dependent Children, Old Age Security, and Aid to Blind programs. W & I Code Sec. 11458, 12200, and 12700 respectively. The provision of W. & I. Code Sec. 13750 permitting the county to cancel, suspend or revoke Aid to Disabled Benefits "after investigation" imposes the same hearing requirement as the "for cause" provisions of the other sections. See *Steen v. Board of Civil Service Commissioners* (1945) 26 C.2d 716, 160 P.2d 816, "The words 'hearing' and 'investigation' may mean the same thing." *Ratliff v. Lampton* (1948) 32 C.2d 226, 231, 195 P.2d 792, 795.

there is a right to administrative review after the revocation." 32 C.2d at 230, 195 P.2d at 795.

An identical statutory scheme manifests the Legislature's intent to require a hearing prior to action in the instant case. The county is required to act for cause or after investigation in terminating aid, and a hearing subsequent to action is provided before the Director of the State Department of Social Welfare. W. & I. Code Sec. 10950 et seq.

The District Court held that PSS 44-325.43 meets the requirement of a hearing prior to the withdrawal of benefits. The regulation provides that an initial decision to withhold or terminate benefits is made by administrative personnel in the County Department on the basis of evidence which is presented and reviewed *ex parte* and which may be totally hearsay, circumstantial or untested opinion. It permits the county to give the affected recipient as little as three days' notice of the decision to withdraw benefits and requires that the caseworker, an eligibility worker or other unspecified person in the county department be available for an informal conference with the recipient. At the conference, the recipient is confronted for the first time with the evidence on which the withholding action is based and may provide any explanation or information he may wish in support of his eligibility. The decision to withhold benefits takes effect automatically unless as a result of the informal conference or on some other ground, the county department reverses itself. It is clear from *Ratliff* and the cases on which it relies that the statutory requirement that welfare benefits be terminated for cause carries with it the right to a procedurally adequate hearing prior to withdrawal of benefits regardless of the existence of subsequent review.

Steen v. Board of Civil Service Commissioners, (1945) 26 C.2d 716, 160 P.2d 816, and the other cases relied on in *Ratliff,* established beyond doubt that when an agency may act for cause only, it must provide a hearing subject to the procedural and evidentiary rules normally associated with the term and not left to the unfettered discretion of the agency.

In *Steen,* the court specifically disapproved a statement in a prior case that the conduct of a hearing and the class of evidence to be heard were matters of administrative discretion and that nothing more was required than that the affected party "be permitted to produce his evidence". The court stated that this was too permissive and that "a hearing is required with all that the term implies", where a board is required to "investigate" a civil service discharge. 26 S.2d at 725, 160 P.2d at 821.

As to the evidence required to support an administrative determination of cause, three of the cases principally relied on in *Ratliff* cite the rule established in *Walker v. City of San Gabriel* (1942) 20 C.2d 879, 129 P.2d 349, that hearsay alone cannot support an administrative decision. *Steen v. Board of Civil Service Commissioners* (1945) 26 C.2d 716, 727; 160 P.2d 816, 822; *La Prade v. Department of Water and Power* (1945) 27 C.2d 47, 51; 162 P.2d 13, 15; *Covert v. State Board of Equalization* (1946) 29 C.2d 125, 173 P.2d 545. The court in *Steen* ruled that the petitioner was denied a hearing where the only evidence introduced in support of the administrative decision was an unsworn and unverified investigation report. 26 C.2d at 727, 160 P.2d at 822.

In *La Prade, supra,* the court stated that even if an investigation report is competent evidence, no hearing is had unless the report "is introduced into evidence and the accused is given an opportunity to cross-examine the maker thereof and refute it." 27 C.2d at 52, 162 P.2d at 16.

Although the court in *Ratliff, supra,* indicated that the hearing prior to action might be less formal than the subsequent hearing, it did not sanction a conference subject to no procedural or decisional rules whatever. Procedures virtually identical to those provided by PSS 44-325.43 were, as a practical matter, undoubtedly available in *Ratliff* also, since the statute required ten days notice prior to the revocation of a license. During this period, administrative officials were presumably available and willing to inform the licensee of the basis of their proposed action and to listen to any explanation or information he wished to provide. Yet it was not even contended that the opportunity for informal review afforded by the ten-day notice period constituted the hearing required by statute.

The use of an informal conference to meet a statutory requirement that administrative action be "for cause only" was specifically rejected in *Keenan v. S.F. Unified School District* (1950) 34 C.2d 708, 214 P.2d 382. The court stated that "informal interviews with administrative officers . . . did not constitute a hearing contemplated by the statute." 34 C.2d at 715, 214 P.2d at 386.

PSS 44-325.43 provides no more than the informal interview with administrative personnel which was specifically found not to be a hearing in *Keenan* and which was presumably available with an even greater notice period in *Ratliff*. It permits a decision of ineligibility to be rendered solely on the basis of an investigator's hearsay report, which California courts have consistently held to be a denial of a hearing. *Walker v. City of San Gabriel* (1942) 20 C.2d 879, 129 P.2d 349; *Steen v. Board of Civil Service Commissioners* (1945) 26 C.2d 716, 160 P.2d 816; *La Prade v. Department of Water and Power* (1945) 27 C.2d 47, 162 P.2d 13. In failing to specify the nature of the conference, the regulation vests in the county the same unlimited dis-

cretion which *Steen* specifically disapproved. Far from meeting the requirements of a hearing under California law, the regulation exhibits the same defects which have rendered other procedures inadequate to meet statutory requirements identical to those presented here.

Further indicative of the legislative intent to require greater safeguards than the regulation provides prior to termination is the length of time permitted by statute for the rendition of the state "fair hearing decision". Although newly adopted regulations of the State Department of Social Welfare require such a decision within sixty days after the hearing, (Operations Manual, 22-043 through 22-065, (see also, Federal Handbook § 6200(j)), the Legislature has explicitly permitted 180 days to elapse before such a decision is rendered. W.&I. Code Sec. 10950 et seq. The length of this statutory time limit provides a clear indication that in requiring cause for the withdrawal of benefits, the Legislature must have intended to provide a hearing fully adequate to protect the aid recipient during the six months permitted for subsequent review.

The hearing required by statute may afford greater safeguards than due process requires. In *Ratliff v. Lampton*, (1948) 32 C.2d 226, 232, 195 P.2d 792, 796, the court specifically stated that while the summary revocation of a driver's license might be constitutionally permissible, this "cannot be used to imply a legislative intent to deny [the right to a hearing] before the revocation." Later the Constitution was held *not* to require a hearing, *Escobedo v. State of California* (1950) 35 C.2d 870, 222 P.2d 1, leaving *Ratliff* to stand for the proposition that "for cause" in a statute means more than "due process" in the U.S. Constitution.

CONCLUSION

For the foregoing reasons this Court should reverse the judgment of dismissal rendered by the District Court as to the class. It should make clear that informal proceedings have a place in the system, but that such procedures do not due process when a proceeding has become adversary in nature. It should make clear that aid to welfare recipients may not be terminated or withheld without an adequate hearing, and that such a hearing must include all the safeguards that are customarily available in adjudicatory proceedings, including adequate notice, right to counsel, confrontation and cross examination, a record of the evidence, a decision based on the evidence by an impartial person and a decision on the merits.

Dated,
Oakland, California, June 20, 1969

Respectfully submitted,

THOMAS L. FIKE
THOMAS SCHNEIDER
BURTON DANZIGER
DAVID NAWI

Attorneys for Amicus Curiae,
Legal Aid Society of
Alameda County

(Appendices follow)

Appendix A

44-325 CHANGES IN AMOUNT OF PAYMENT 44-325

.1 *When Change is Effective*

Whenever any change in the circumstances requires a change in grant, or a discontinuance of aid the appropriate change or discontinuance is to be made effective as soon as possible. (See Sections 44-333.12, Adjustment Period, and 44-331.1, Adjustment of Underpayment by Authorization of Retroactive Aid.)

.11 If the change in the aid payment (as determined in accord with PSS Section 44-315.5), amounts to less than $2 per month, such change is not to be made.

.12 *Decrease:* Where the required change is a *decrease* of $2 or less, it shall be effective not later than the second month following that in which the changed circumstances were reported, and no adjustment is to be made for overpayment of $2 or less in the month of reporting or in the following month.

.13 *Increase:* When the change in circumstances will continue for only one or two months, and the amount of the *increase* would be $2 or less, no change is made in the continuing authorization.

.2 *Change in Income or Need*

.21 *Change and Amount Known in Advance*

If a change in income or need, including the amount, is known in advance, any necessary change in the amount of payment is made effective with the month in which the changed circumstances will occur.

AFDC .22 *Change Known in Advance But Amount Not Known*

.221 *Concurrent Payment and Budget Periods*

When it is known that income will start in the next month but the exact amount is not known, or when income is variable in amount, an estimate of the expected income shall be made, on the basis of available information, for the purpose of determining the next current month aid payment. If the estimate indicates ineligibility for any grant, aid may be withheld pending verification of actual income (see Section .421 below). If the estimated income proves to be incorrect when actual income is reported, corrective action is taken to adjust the payment within the limitations of PSS Sections 44-331 and 44-335.

.222 *Budget Planning Period with Subsequent Payment Period*

Actual income received in the Planning Period is reported and reflected in the subsequent payment.

AB
ATD
OAS
AFDC .3 *Discontinuance*

If a recipient's circumstances change to the extent that he no longer meets the eligibility requirements, aid shall be discontinued effective the last day of the month for which the last payment was made. (See PSS Section 44-315 re appropriate action when the recipient is no longer eligible to a cash grant but remains eligible to medical assistance as a medically needy person.)

.4 *Withheld Payment*

.41 Withheld Payment—Defined

A withheld payment is one which is held beyond the usual delivery date while information concerning

needs, income or basic eligibility is investigated, subject to Section 44-325.43.

.42 Limitations on and Requirements for Withholding of Aid Payment

Subject to the following limitations, aid payments shall be withheld when further investigation is necessary to determine continuing eligibility.

.421 Recipients should have the assurance of regular and continued aid payment without interruption or delay. Accordingly, an aid payment may be withheld beyond the usual delivery date only when evidence which is both substantial in nature and reliable in source is received by the county, indicating:

a. Probable ineligibility of the recipient, or
b. A probable overpayment has occurred or is occurring which can be adjusted only if aid payment is withheld.

.422 Aid payment shall not be withheld pending ascertainment of increases in federal benefits such as social security or increases in benefits payable by a public agency. (W&IC Section 11014.)

.423 Aid payment shall not be withheld because of actual or probable changes in need or income when it appears that any resulting overpayment can be adjusted in the grant(s) for a subsequent month or months. (See PSS Section 44-335.) (If a recipient will be disadvantaged by delaying the adjustment another month, the county should discuss with the recipient the desirability of an immediate cur-

rent cash adjustment for the overpayment in lieu of the delayed grant adjustment.)

.424 An initial payment shall not be withheld beyond the month for which it was authorized.

AFDC

.425 The first installment of a month's *AFDC* aid payment may be withheld if the county's evaluation of circumstances indicates probable ineligibility. If the question cannot be resolved by the end of the first semi-monthly period following that in which it arose, the second payment is always withheld.

Unless the first installment of a month's aid payment has been withheld, the second installment is never withheld except when:

a. *Probable or actual ineligibility for the first installment was discovered too late to hold that payment, or*

b. *Probable overpayment is occurring which can be adjusted only if the second installment is withheld or if the recipient would be seriously disadvantaged by the delayed adjustment.*

For counties on the Subsequent Payment Plan the second installment is never withheld because of changes occurring within the current payment period.

AB
ATD
OAS
AFDC

.43 *Notification to Recipient When Aid Payment is Withheld*

The recipient, the parent or other person responsible for the child in *AFDC*, shall be notified, in writing, immediately upon the initial decision being made to withhold a warrant beyond its usual deliv-

ery date for any reason other than death, and in no case less than three (3) mail delivery days prior to the usual delivery date of the warrant to the recipient. The county shall give such notice as it has reason to believe will be effective including, if necessary, a home call by appropriate personnel. Form ABCD 239, Notice of Action, or a substitute form, may be used for this purpose. Every notification shall include:

.431 A statement setting forth the proposed action and the grounds therefor, together with what information, if any, is needed or action required to re-establish eligibility or to determine a correct grant.

.432 Assurance that prompt investigation is being made; that the withheld warrant will be delivered as soon as there is eligibility to receive it; and that the evidence or other information which brought about the withholding action will be freely discussed with the recipient, parent, or other person, if he so desires (see Section .434 below).

.433 A statement of whether, if aid is withheld, the recipient will or will not continue to be certified for medical assistance during the month aid is withheld.

.434 A statement that the recipient, parent, or other person may have the opportunity to meet with his caseworker, an eligibility worker, or another responsible person in the county department, at a specified time, or during a given time period which shall not exceed three

(3) working days, and the last day of which shall be at least one (1) day prior to the usual delivery date of the warrant, and at a place specifically designated in order to enable the recipient, parent, or other person:

(a) To learn the nature and extent of the information on which the withholding action is based;

(b) To provide any explanation or information, including, but not limited to that described in the notification pursuant to Section .431 above;

(c) To discuss the entire matter informally for purposes of clarification and, where possible, resolution.

AB
ATD
OAS
AFDC

.44 *Investigation and Time Limitations*

.441 Evidence raising doubt concerning eligibility or the correctness of grant is to be evaluated, and any needed investigation initiated and completed promptly, regardless of whether there is basis for withholding an aid payment. Such investigation must be completed and appropriate action with respect to the grant taken, within not more than 30 calendar days after the date on which the information which raised doubt concerning eligibility or the grant was received by the county. (See Section 40-155.2 regarding Methods of Investigation.)

.442 Aid payment for a second month may be withheld when the investigation is completed and the facts regarding continuing eligibility or

correctness of grant are established too late in the 30-day period:

a. To permit any necessary discontinuance of aid prior to the second month unless the aid payment is withheld, or

b. To permit necessary adjustment in the aid payment where eligibility continues but to a lesser amount, and delay in the adjustment for another month would result in overpayment which could not be adjusted.

When aid is withheld for a second month the withheld warrants shall be reissued in the correct amount and delivered to the recipient within a maximum of ten calendar days following the normal due date for the second withheld warrant, or delivered to the recipient and a current cash adjustment obtained from him. (See Section 44-333.12.)

.45 *Action on Withheld Aid Payment Following Investigation*

.451 Investigation Establishes Recipient Eligible to Receive Aid and That Withheld Payment Was in Correct Amount.

The withheld payment shall be delivered immediately and aid payment continued. (If the recipient was eligible on the first day of the month aid shall be paid for the entire month.)

.452 Investigation Establishes Eligibility but That Aid should Be Paid in An Amount Less Than the Withheld Payment.

The withheld payment shall be delivered, provided any resulting overpayment can be adjusted within the adjustment period. In such case at the time the withheld warrant is delivered, the recipient shall be informed regarding the future grant adjustment(s) which must be made. If the resulting overpayment cannot be adjusted in the adjustment period, the withheld payment shall be canceled and reissued and any indicated change made in the continuing grant.

.453 Investigation Establishes Recipient Was Ineligible to Withheld Payment but Continues Eligible to Aid.

The withheld payment is canceled and such cancellation is not considered an interruption in the authorization for payment.

AB
ATD
OAS
AFDC

.454 Investigation Establishes Ineligibility to Withheld Payment and to Continuing Aid.

a. Aid was withheld because of probable ineligibility.

Both the cash grant payment and certification for medical assistance are discontinued retroactively effective the last day of the last month for which a cash grant payment was made. The withheld cash grant payment is canceled.

b. Aid was withheld solely for the purpose of determining the amount of aid to which the recipient was eligible but he subsequently was found to be ineligible.

There are two discontinuance dates both which must be entered on the document discontinuing aid.

The cash grant payment is discontinued retroactively effective the last day of the last month for which a cash grant payment was made and the withheld payment is canceled.

Medical assistance is discontinued effective the last day of the last month for which aid was withheld. (This later discontinuance date is necessary because such recipient continued to be certified for medical assistance as a public assistance recipient during the period aid was withheld.)

.455 Investigation Not Completed at End of 30 Days.

a. Preponderance of Evidence Indicates Recipient Is Ineligible.

Aid is discontinued in the manner specified in Section .454 above.

b. Basic Eligibility Not in Question but There is Still an Unresolved Question Regarding the Amount of Aid to Which Recipient is Eligible.

The withheld warrant and, if indicated, the continuing grant are adjusted on the basis of the best available information and the payments issued to the recipient, the investigation continues and when completed appropriate adjustment is made.

Appendix B

A COMPARISON OF CERTAIN PROCEDURES OF SELECTED ADMINISTRATIVE AGENCIES

This appendix describes the Rules of Procedure governing proceedings which are used by a representative group of administrative agencies in acting to revoke or suspend a license or privilege granted to an individual. The appendix does not purport to set out all the procedural rules of all federal and state agencies. Rather it seeks to demonstrate that many decision-making administrative bodies generally have more procedural safeguards integrated into their hearings on the revocation of privileges than those which are provided by the California State Department of Social Welfare in hearings on the termination of welfare benefits.

The agencies referred to and the functions they perform, subject to the procedures outlined, and the abbreviations used hereinafter are the following:

Welfare:

The County Welfare Department under the regulations of the California State Department of Social Welfare, Public Social Services Manual, Section 44-325.43, when terminating welfare assistance.

Cal. A.P.A.:

The more than 44 agencies subject to the California Administrative Procedure Act (Govt. Code Sections 11500 et seq.) when exercising the power to revoke licenses or terminate privileges.

Cal. Civil Service:

The California State Personnel Board when dismissing a civil service employee for cause. (Govt. Code Sections 19570 and 19500.)

School Boards:

Governing Boards of the school districts in California when dismissing permanent teachers. (Ed. Code Section 13404.) (When temporary teachers are dismissed for cause and request a hearing, the California Administrative Procedures Act (Govt. Code Sections 11500 et seq.) applies.)

D.M.V.:

California Department of Motor Vehicles, when suspending or revoking the privilege of any person to operate a motor vehicle. (Vehicle Code Section 13800.)

U.S.A.P.A.:

Agencies subject to the Federal Administrative Procedure Act, 5 U.S.C. Section 551; i.e., all agency action of the Atomic Energy Commission (42 U.S.C. Section 2231); procedure of the Detention Review Board (50 U.S.C. Section 818); rules governing employment in executive, administrative, professional or outside salesman capacities under the Fair Labor Standards Act (29 U.S.C. Section 213[a]); administrative proceedings conducted under the Farm Labor Contractor Registration Act; hearings under the Federal Communications Act (47 U.S.C. Section 409); agency action taken under the Helium Act (50 U.S.C. Section 167[h]); rules and orders of federal departments and agencies issued to prohibit exclusion of persons from participation in federally assisted programs because of race, color or national origin (42 U.S.C. Section 2000[d-2]); revocation of seaman's documents by the Secretary of Transportation (46 U.S.C. Section 239); conduct of proceedings by the Subversive Activities Control Board (50 U.S.C. Section 795); proceedings under the Uniform Time Act of 1966 (15 U.S.C. Section 266); Walsh-Healy Act (41 U.S.C. Section 43(a).

C.A.B.:

Civil Aeronautics Board (Federal Aviation Administrator) when suspending or revoking any navigation certificate. (49 U.S.C. Section 1429.)

Defense Security:

U.S. Department of Defense, Industrial Personnel Security Clearance Program, when revoking the security clearance of a person employed in private industry. (32 C.F.R. Sections 155.7-155.9 (1968))

Immigration:

United States Immigration Authority when determining whether an alien should be deported. (8 U.S.C. Section 1252 (1964).)

1. HOW MUCH MINIMUM NOTICE OF THE ACTION IS THE INDIVIDUAL AGAINST WHOM SUCH ACTION IS TO BE TAKEN ENTITLED TO?

Agency	Answer	Citation
Welfare:	3 days	
Cal. A.P.A.:	25 days	Gov. Code 11505(b) and 11509
Cal. Civil Service:	15 days after action effective	See Gov. Code 19574
School Boards:	30 days plus	Ed. C. 13404 and 13412
D.M.V.:	20 days; except where physical & mental health of the licensee requires immediate action.	Veh. C. 14107, 14100 and 13953.
U.S. A.P.A.:	Timely notice	80 Stat. 384 (1966); 5 U.S.C. 554(b) (Supp. II, 1967).
C.A.B.:	15 days plus adequate notice	72 Stat. 779 (1958); 49 U.S.C. 1429 (1964); 14 C.F.R. Sec. 13.55 (1968); 14 C.F.R. Sec. 13.19(c)(4)(1968).
Defense Security:	20 days plus reasonable time to prepare	32 C.F.R. 155.7(a)(7) 32 C.F.R. 155.7(a)(8)
Immigration:	Reasonable under all the circumstances	66 Stat. 209 (1952); 8 U.S.C. 1252(b)(1) (1964)

2. IS THE INDIVIDUAL AGAINST WHOM ACTION IS BEING TAKEN ENTITLED TO BE REPRESENTED BY COUNSEL AT THE HEARING?

Agency	Answer	Citation
Welfare:	Not specified; presumably yes	
Cal. A.P.A.:	Yes	Gov. C. 11509
Cal. Civil Service:	Yes	See Gov. C. 19574.1
School Boards:	Yes	Ed. C. 13425
D.M.V.:	Yes	Veh. C. 14112
U.S. A.P.A.:	Yes	80 Stat. 385 (1966); 5 U.S.C. 555(b) (Supp. II, 1967).
C.A.B.:	Yes	14 C.F.R. 13.33 (1968).
Defense Security:	Yes	32 C.F.R. 155.7(a)(8) (1968).
Immigration:	Yes	66 Stat. 209 (1952); 8 U.S.C. 1252(b)(2) (1964).

3. IS THE INDIVIDUAL AGAINST WHOM ACTION IS BEING TAKEN ENTITLED TO HAVE WITNESSES SUBPOENAED TO TESTIFY IN HIS BEHALF?

Agency	Answer	Citation
Welfare:	No	
Cal. A.P.A.:	Yes	Gov. C. 11510(a)
Cal. Civil Service:	Yes	Gov. C. 19581
School Boards:	Yes	Ed. C. 13417, 13425
D.M.V.:	Yes	Veh. C. 14112
U.S. A.P.A.:	Yes	80 Stat. 385 (1966); 5 U.S.C. 555(d)(Supp. II, 1967).
C.A.B.:	Yes	14 C.F.R. 13.57 (1968).
Defense Security:	Yes	32 C.F.R. 155.7(b)(3) (1968).
Immigration:	Yes	66 Stat. 198 (1952); 8 U.S.C. 1225(a)(1964).

4. IS THE INDIVIDUAL AGAINST WHOM ACTION IS BEING TAKEN ENTITLED TO CROSS-EXAMINE WITNESSES TESTIFYING AGAINST HIM?

Agency	Answer	Citation
Welfare:	No	
Cal. A.P.A.:	Yes	Gov. C. 11513(b).
Cal. Civil Service:	Yes	Gov. C. 19580.
School Boards:	Yes	Ed. C. 13417, 13425.
D.M.V.:	Yes	Veh. C. 14112.
U.S. A.P.A.:	Yes	80 Stat. 386 (1966); 5 U.S.C. 556(d) (Supp. II, 1967).
C.A.B.:	Yes	14 C.F.R. 13.59 (1968).
Defense Security:	Yes, except if revealing informer's identity would harm national interest.	32 C.F.R. 155.7(a)(8), 155.7(d-5) (1968).
Immigration:	Yes	66 Stat. 209 (1952); 8 U.S.C. 1252(b)(3) (1964).

5. DOES THE GOVERNING REGULATION SPECIFY THAT THE PERSON ACTING AS REFEREE OR JUDGE AT THE HEARING MUST NOT HAVE HAD ANY PRIOR CONNECTION WITH THE CASE?

Agency	Answer	Citation
Welfare:	No	
Cal. A.P.A.:	Yes, ordinarily	Gov. C. 11512(c)
Cal. Civil Service:	Not specified	
School Boards:	Yes. Hearing is in state superior court.	Ed. C. 13412, 13418.
D.M.V.:	Yes	Veh. C. 14107.
U.S. A.P.A.:	Yes	80 Stat. 384 (1966); 5 U.S.C. 554(d)(Supp. II, 1967).
C.A.B.:	Probably	14 C.F.R. 13.39 (1968).
Defense Security:	Yes	32 C.F.R. 155.6(f) (1968).
Immigration:	Yes	66 Stat. 209 (1952); 8 U.S.C. 1252(b) (1964).

6. DOES THE DECISION TO REVOKE THE PRIVILEGE TAKE EFFECT ONLY AFTER THE INDIVIDUAL SUBJECT TO THE ADVERSE ACTION HAS HAD AN OPPORTUNITY TO BE HEARD? (Note that the value of the opportunity to be heard varies depending on the protections afforded at the hearing.)

Agency	Answer	Citation
Welfare:	Yes	
Cal. A.P.A.:	Yes	Gov. C. 11505.
Cal. Civil Service:	No Yes, where charges filed by an individual.	Gov. C. 19574, 19574.5, and 19583.5.
School Boards:	Yes, except for immoral conduct, conviction of felony, etc.; but permanent teacher is paid for 30 days.	Ed. C. 13404, 13408.
D.M.V.:	Yes, except where the physical or mental health of the licensee requires immediate action.	Veh. C. 13950, 13953.
U.S. A.P.A.:	Yes	80 Stat. 384 (1966); 5 U.S.C. 554(a)(Supp. II, 1967).
C.A.B.:	Yes, except in cases of air safety emergencies.	72 Stat. 779 (1958); 49 U.S.C. 1429 (1964).
Defense Security:	Yes, except where delay would pose an immediate threat to the national interest.	32 C.F.R. 155.7(a) and 155.8 (1968).
Immigration:	Yes	66 Stat. 208 (1952); 8 U.S.C. 1252(c) (1964).

7. IS THE ADVERSE ACTION STAYED BY AN APPEAL TO A HIGHER BRANCH OF THE AGENCY OR TO A JUDICIAL TRIBUNAL?

Agency	Answer	Citation
Welfare:	No, except for the trial court's judgment and mandate in McCullough v. Terzian.	
Cal. A.P.A.:	Yes	Gov. C. 11519, 11521.
Cal. Civil Service:	No	Gov. C. 19574.
School Boards:	Yes	Ed. C. 13404, 13436.
D.M.V.:	Not applicable; Director makes decision.	Veh. C. 14110, 14111.
U.S. A.P.A.:	Yes, on motion.	80 Stat. 393 (1966); 5 U.S.C. 705 (Supp. II, (1967).
C.A.B.:	Yes, except in cases of air safety emergencies.	72 Stat. 779 (1958); 49 U.S.C. 1429 (1964).
Defense Security:	Yes, upon examiner's determination.	32 C.F.R. (1968); 155.7 (e)(1).
Immigration:	Yes	8 C.F.R. 3.6 (1968).

Appendix C

Court of Appeal of the State of California
First Appellate District—Division Three

1 Civil No. 25830

Mary McCullough, et al.,
Plaintiffs and Respondents,
v.
Hrayr Terzian, et al.,
Defendants and Appellants.

OPPOSITION TO INTRODUCTION OF ADDITIONAL EVIDENCE

Respondent by letter dated June 10, 1969 to the Honorable Lawrence R. Elkington, Clerk of the Court of Appeal, First Appellate District enclosed "additional documentary evidence to be presented to the Court for addition to the record as a supplement to Respondents' Motion for Leave to Offer Additional Documentary Evidence, set for hearing June 18, 1969 at 10 o'clock a.m."

Appellant opposes this latest offer on the following grounds:

1. Such offer does not comply with Rule 41 of California Appellate Rules of Court which requires that not only the notice but the "accompanying papers shall be served and filed at least 15 days before the date designated for hearing of the motion."

2. The purported evidence consisting of a chart and explanatory correspondence, is irrelevant and immaterial —cost to the state has not been put in issue; in addition the material does not purport to be complete.

Submission of this material and the initial offer of the fair hearing decisions are solely for the purpose of obfuscating the real issue before the court, i.e., does the pretermination of aid procedures meet minimum due process requirements.

Dated: June 12, 1969

THOMAS C. LYNCH
Attorney General

ELIZABETH PALMER
Deputy Attorney General
Attorneys for Defendants and Appellants

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. ~~634~~ 14

MAE WHEELER, et al.,
Appellants,

v.

JOHN MONTGOMERY, et al.,
Appellees.

Appeal from the United States District Court
for the Northern District of California

BRIEF FOR APPELLANTS

PETER E. SITKIN
STEVEN J. ANTLER
SIDNEY M. WOLINSKY
CHARLES STEPHEN RALSTON
1095 Market Street
San Francisco, California 94103
Telephone: (415) 626-3811
Attorneys for Appellants

EDWARD V. SPARER
MICHAEL S. ZOLA
WINTON D. WOODS JR.
Of Counsel.

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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Wedemeyer and Moore, The American Welfare System, 54 Calif. L. Rev. 326 (1966) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 634

MAE WHEELER, et al.,
Appellants,

v.

JOHN MONTGOMERY, et al.,
Appellees.

Appeal from the United States District Court
for the Northern District of California

BRIEF FOR APPELLANTS

OPINIONS BELOW

The memorandum and order [A. 61-64] of the court below finally dismissing the claim set forth in appellants' complaint is reported at 296 F. Supp. 138 (1968). The memorandum and order of the United States District Court for the Northern District of California [A. 27-33] requesting the convening of a three-judge court and permitting appellants to proceed as a class pursuant to Rule 23, Federal Rules of Civil Procedure, is unreported. The temporary restraining order filed by the court below [A. 23-26] is unreported.

JURISDICTION

This is a direct appeal to this court pursuant to 28 U.S.C. §§ 1253 and 2101(b) from the final decision of the three-judge court below which was convened in compliance with 28 U.S.C. § 2281.

The court below had jurisdiction pursuant to 42 U.S.C. § 1983, 28 U.S.C. §§ 1343(3) and (4), and 28 U.S.C. §§ 2201 and 2202, to grant the requested injunctive and declaratory relief against the continued application to appellants of regulations of the California Department of Social Welfare (hereinafter referred to as California Department) implementing statutes of statewide application which permit termination of welfare benefits without adequate notice and hearing. The final judgment of the court below denying the requested relief and dismissing the action was entered on April 19, 1968. Appellants filed notice of appeal on June 14, 1968. On July 24, 1968, an application, pursuant to Supreme Court Rule 13, for an extension of time to docket the appeal and file the record, was made to Mr. Justice Douglas. On July 29, 1968, the application was granted ordering that time for docketing the appeal be extended to October 12, 1968. The appeal was docketed on October 11, 1968, and this court noted probable jurisdiction on April 21, 1969. .... U.S. ...., 89 S. Ct. 1452 (1969). On May 13, 1969, appellants' motion for an extension of time to file the appendix and brief was granted and the time extended to and including July 1, 1969.

QUESTIONS PRESENTED

Appellant Mae Wheeler (Wheeler) is a 75 year-old widow who receives Old Age Security welfare benefits. She and all other welfare recipients depend on their monthly grants to provide themselves with minimal food, shelter, clothing

and medical care. Termination of their welfare grants can, for some, literally mean the difference between life and death. Under these circumstances:

(1) does due process permit the termination of a regularly recurring subsistence grant to welfare recipients without adequate notice and without a prior hearing on the factual questions underlying the decision to cut off assistance; and

(2) does an interview with a caseworker or other county welfare official without notice of the evidence relied on for termination and without confrontation or cross-examination satisfy the requirements of the Due Process Clause for a prior hearing?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States.

This case also involves the Social Security Act of 1935, as amended, 42 U.S.C. §§ 302(a)(4) *et seq.* The following portions of the Social Security Act are set forth in Appendix I, *infra*, pp. 1a-2a:

42 U.S.C. § 302(a)(4)
42 U.S.C. § 602(a)(4)
42 U.S.C. § 1202(a)(4)
42 U.S.C. § 1382(a)(4).

This case also involves regulations promulgated under authority of the above statutes. The following regulations are set forth in Appendix II, *infra*, pp. 3a-13a.

Fair Hearings, 25 C.F.R. § 205.10.

The Department of Health, Education, and Welfare (HEW) Handbook of Public Assistance Administration (hereinafter referred to as Federal Handbook), Part IV, §§ 6200, *et seq.*

This case also involves the California Welfare and Institutions Code, the following portions of which are set forth in Appendix III, *infra*, pp. 14a-18a:

Cal. W & I § 12200
Cal. W & I § 12201
Cal. W & I §§ 10950-10965.

This case also involves the California State Department of Social Welfare Public Social Services Manual (hereinafter referred to as PSS) § 44-325.43, set forth in Appendix IV, *infra*, pp. 19a-20a.

STATEMENT

Appellant Wheeler, an elderly widow, suffering from heart disease and diabetes, lives alone in an apartment leased to her by the San Francisco Housing Authority [A. 41]. She survives solely on her welfare check of $113.95 per month and her monthly Social Security payment of $44.60 [A. 24, 56]. Mrs. Wheeler received her monthly welfare check (termed Old Age Security) for almost nine years until August 1, 1967 [A. 56].[1]

On August 30, 1967, the San Francisco Department of Social Services (hereinafter referred to as the Welfare Department) learned from an anonymous caller that Mrs.

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1. The Old Age Security program is administered by the county welfare departments in accordance with the rules of the California Department of Social Welfare under the direction of appellee John Montgomery. The rules and regulations of the California Department are established pursuant to the California Welfare and Institutions Code, and in conformity with the requirements of the Social Security Act and with the rules and regulations promulgated by HEW, 49 Stat. 620 (1935), as amended, 42 U.S.C. § 302; see also HEW Federal Handbook. The Old Age Security program is one of the three major categorical public assistance programs established by the Social Security Act, the other two being Aid to Families with Dependent Children and Aid to the Totally Disabled. The programs are financed largely by the Federal Government on a matching fund basis and are administered by the states. *King v. Smith*, 392 U.S. 309, 313, 316 (1968).

Wheeler had received the proceeds of her late son's veteran's insurance policy [A. 56]. A county welfare supervisor called Mrs. Wheeler on that date and Mrs. Wheeler explained that she did not have the money as she had transferred it to her grandson to satisfy her late son's debt [A. 56]. The Welfare Department immediately withheld Mrs. Wheeler's September 1, 1967 welfare check, leaving her to subsist on her $44.60 per month Social Security payments [A. 24, 56].

On September 14, 1967, Mrs. Wheeler called Mr. Arthur Agnos, Assistant Director of Human Relations for the San Francisco Housing Authority, for help to have her welfare restored [A. 19]. Mr. Agnos called Mrs. Wheeler's welfare worker and was told that Mrs. Wheeler's Old Age Security check had been suspended until an investigation could be made [A. 19].

After receiving notification of the grounds for the withholding and the information needed to resume aid, on September 18, 1967, Mr. Agnos, Mrs. Wheeler, and a relative, met with the welfare worker and another representative from the Welfare Department. At this time Mrs. Wheeler presented written statements further explaining that she had not intended to deceive the Welfare Department and that she transferred the money to her grandson to carry out her late son's dying wish [A. 21].

On September 22, 1967, Mr. Agnos called the welfare worker and she informed him that additional information would be required to amplify the earlier statements. This information necessitated writing to Texas, obtaining a supplemental statement from Mrs. Wheeler's grandson, and a trip to Milpitas, California [A. 22]. On October 16, 1967, Mrs. Wheeler presented this information to the caseworker, but her aid was not restored [A. 22].

Mrs. Wheeler received no welfare whatsoever during the months of September and October 1967. In November 1967,

the Welfare Department formally confirmed its termination of Mrs. Wheeler's aid [A. 57]. Mrs. Wheeler requested a Fair Hearing[2] from the California Department and restoration of her welfare payments until a hearing could be held, asserting her lack of food, medicines and other necessities, including inadequate funds for payment of rent [A. 57]. The California Department failed to act on her request for temporary restoration of payment [A. 9].

On December 6, 1967, Judge Alfonso J. Zirpoli of the court below entered a finding that irreparable injury was being suffered by Mrs. Wheeler and issued a temporary restraining order directing the California Department and the Welfare Department to restore immediately Mrs. Wheeler's welfare assistance until a decision was rendered following the Fair Hearing to be held by a state referee [A. 23-26]. For nearly three months Mrs. Wheeler subsisted solely on her $44.60 monthly Social Security.[3]

On December 20, 1967, Judge Zirpoli entered a class action order pursuant to Fed R. Civ. P. 23(b)(2), the class being composed of all Old Age Security recipients in California,[4] and ruled that a determination by a three-judge court was required [A. 27-33].

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2. The Fair Hearing is an administrative appeal procedure required by the Social Security Act and available in all states. In the Fair Hearing the local welfare department's determination is reviewed by an impartial official of the state welfare department. See, HEW, Federal Handbook, Part IV, §§ 6200, *et seq.*, for the procedural elements embodied in the Fair Hearing (set out in full in Appendix II, pp. 3a-13a).

3. As of December 1, 1967, Mrs. Wheeler was promised a county General Assistance supplement which would have given her a total income of $98.50 per month as compared with her minimum needs under the Old Age Security program of $158.55 per month [A. 56].

4. The latest statistics available indicate that there are approximately 291,000 Old Age Security recipients in California. California Department of Social Welfare, *Public Welfare in California, Annual Statistical Report*, Table 1 (1967-68).

Mrs. Wheeler did not secure a Fair Hearing before an impartial referee on the validity of the Welfare Department's discontinuance until December 22, 1967 [A. 57]. The referee found Mrs. Wheeler's discontinuance improper, concluding that:

> "In the absence of any internal inconsistencies or other evidence to the contrary . . . it cannot be concluded that the transfer was a transfer to qualify for aid..." [A. 46-47].

Not until January 12, 1968, over four months after the discontinuance of Mrs. Wheeler's Old Age Security, did the Director of the California Department adopt the referee's decision and order full restoration of Mrs. Wheeler's welfare assistance [A. 57].

After the three-judge court convened, the California Department adopted a new regulation regarding the procedures to be followed when county welfare departments decide to withhold welfare grants. The new regulation provided recipients with a minimum of three days' notice before termination and an "opportunity to meet with the caseworker, an eligibility worker, or other responsible person" for a conference "to discuss the entire matter informally for purposes of clarification, and where possible, resolution." [A. 60-61; Appendix IV, pp. 19a-20a].

On April 19, 1968, the court below entered its final order holding that appellant Wheeler had gained the relief she sought, and that, as to the other members of the class, the newly-promulgated regulation met the requirements imposed by the Due Process Clause of the Fourteenth Amendment [A. 62-65]. On that basis the court below dismissed the action.

Appellants then brought this appeal contending that the procedure Mrs. Wheeler endured is constitutionally impermissible and that the newly-promulgated regulation does

not provide a constitutionally adequate protection against continuing recurrences of unlawful termination of welfare grants.[5]

SUMMARY OF ARGUMENT

More than ten million Americans are dependent upon public assistance. Those who are charged with the administration of public assistance programs have developed a complex of procedures by which the right to receive assistance is determined, modified and terminated. The procedures involved in the termination of assistance are particularly important because of the absolute dependency of most welfare recipients. An erroneous decision may work incredible hardship upon an innocent and dependent person.

Under such circumstances, the termination of assistance without adequate notice and a prior hearing would be intolerable. No responsible public official has suggested a return to the "gratuity" concept that characterized the Elizabethan Poor Laws. Termination is, in California, preceded by minimal notice and an opportunity to informally discuss and possibly resolve disputed factual issues. At issue in the case at bar is the constitutional and statutory adequacy of that California procedure.

Appellants contend that the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States requires that the decision to terminate assistance be surrounded by procedural safeguards historically designed to protect against arbitrary official action: adequate notice, an impartial decision-maker, and the right to effectively present one's case. Appellants' action is based on the fact that these protections are not available in California until

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5. Although the new California regulation was not in effect at the time of Mrs. Wheeler's termination, it was always open to a welfare recipient to complain and confer with the local county department; Mrs. Wheeler did indeed complain and confer, but to no avail [R. 361-370].

long after the effective date of the critical decision to terminate.

The court below suggested that the existing prior informal conference, coupled with a Fair Hearing after termination, combine to meet constitutional demands. However, appellants contend that the Constitution requires a full and fair hearing before termination. Some lesser procedure cannot be raised to the dignity of a constitutionally adequate hearing by an after-the-fact proceeding.

The Social Security Act can be interpreted to require the continuation of assistance pending the Fair Hearing decision. Indeed, HEW has recently issued a regulation to that effect. This court can properly invoke the traditional liberal construction of remedial statutes and hold that the Social Security Act, in conformity with constitutional requirements, mandates the procedures set forth in the HEW regulation.

Appellants simply ask that this court once again confirm that all Americans, rich and poor alike, are entitled to the basic constitutional guarantee of due process of law.

ARGUMENT

I

DUE PROCESS REQUIRES A FULL AND ADEQUATE HEARING PRIOR TO TERMINATION. THE CALIFORNIA INFORMAL CONFERENCE DOES NOT COMPLY WITH THIS REQUIREMENT.

A. The Welfare Context and the California Informal Conference.

There are 1,200,000 welfare recipients in California. Each month the local welfare departments must make decisions affecting the amount of their grants, granting or denying special needs for furniture, household items, transportation and babysitters, their referral for employment or training, providing services, and, of course, the critical decision to terminate aid.

Welfare departments continuously investigate the eligibility of recipients.[6] This means exploring facts with the recipient, studying documents, and checking conflicting, inconsistent or incomplete information. When the Welfare Department finds there are grounds to suspect that a change has occurred which may result in ineligibility, then aid may be terminated when the department has, in its view, substantial and reliable information indicating "probable ineligibility." [PSS 44-325.421, A-51]

Once the department has made its decision to terminate aid a new California regulation provides for notice to the recipient and an opportunity for an informal discussion with the caseworker or another person in the county welfare department.[7] At this point the recipient is in danger of los-

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6. Over the years the welfare system has operated largely without judicial scrutiny on an uneducated recipient population unaware of their legal rights. See Briar, *Welfare From Below: Recipients' Views of the Public Welfare System*, 54 Calif. L. Rev. 370 (1966); Graham, *Civil Liberties Problems in Welfare Administration*, 43 N.Y.U. L. Rev. 836 (1968); Wedemeyer and Moore, *The American Welfare System*, 54 Calif. L. Rev. 326 (1966).

The relationship between county welfare caseworkers and recipients has been described as "brittle" and "adversary." A former Assistant Secretary of HEW acknowledged that ". . . welfare workers are among those most hated in the Ghetto. . . ." *Report of the National Advisory Commission on Civil Disorders*, Bantam Books Edition (1968), at pp. 457-67.

The California experience has shown that caseworkers (who are not required to have any specialized academic training) have great power over the recipients even to the point where recipients will abandon their constitutional rights rather than risk the caseworker's disfavor. *Parrish v. Civil Service Commission of the County of Alameda*, 57 Cal. Rptr. 623, 628-30, 425 P.2d 223, 228-230 (1967). In a recent California case a county welfare department had systematically failed to inform recipients of their right to apply for welfare and their right to appeal county welfare decisions. *Diaz v. Quitoriano*, 74 Cal. Rptr. 358 (1969), and in *County of Contra Costa v. Social Welfare Board*, 40 Cal. Rptr. 605 (1964), county welfare workers terminated a recipient because she refused to take a lie detector test.

7. PSS 44-325.43 (the reglation challenged herein), *infra*, Appendix IV, pp. 19a-20a.

ing her means of survival—the monthly welfare grant upon which she depends.

A recipient who claims the Welfare Department's action is wrongful and believes herself still eligible for aid must rely on the safeguards embodied in the challenged regulation for her only protection prior to the termination of her welfare grant. However, the regulation is so weak and lacking in procedural protections that there are no effective means established by which a recipient who disputes the department's action can prevent the termination of her grant.

The conference itself is not scheduled for a particular time or with a particular person. The notice does not inform the recipient of her right to appear. The operative language of the notice reads as follows:

> "It is not necessary for you to see us about this notice unless there are facts relating to your needs and/or income or facts which may otherwise affect your eligibility that you have not reported to us. If you have a question about this action and wish to discuss it, please telephone or write to us. We will answer your question or make an appointment to see you in person."[8]

If a recipient knows of the conference procedure and arranges for it, then she will get to see her caseworker, perhaps one day before her check is discontinued. At this time the recipient first learns the basis of the case against her and must respond to it. There is no requirement that there be a record kept of the conference or that any decision, written or otherwise, be rendered. In some cases the caseworker cannot reverse the original decision to terminate even if convinced at the conference. For example, Mrs.

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8. A form of notice sent to terminated recipients is attached to this brief as Appendix V, pp. 21a-22a.

Wheeler, after she presented affidavits and appeared personally before her caseworker, was told that her assistance would be restored. She was later telephoned and told that higher department personnel had confirmed the earlier decision to terminate [A. 22].

Welfare officials face understandable pressure to limit the caseload and reduce costs, both of which make local welfare agencies all the more inclined in cases of doubt to deny or terminate rather than to continue aid.[9] From a statewide random review of the local Welfare Department's files on recipients, the California Department's own eligibility control unit found that 5% of the recipients in the adult categories and 8% in Aid to Families with Dependent Children were erroneously terminated, while in only 1% of the cases was aid mistakenly continued.[10] The eligibility control letter states their findings mean that "a substantial number (in the thousands)" of former recipients ". . . had their assistance grants terminated prematurely." Commenting on these findings the California Assembly Office of Research and the staff of the Assembly Committee on Social Welfare said:

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9. Briar, *The Welfare Appeals System in California*, October 23, 1968 (mimeographed copy on file at the Graduate Social Welfare Library, University of California School of Social Welfare, Berkeley, California), notes as follows:

> "From an analysis of the county case loads it becomes clear that many counties become more restrictive as the fiscal year ends and their budgets become constricted. This may be documented by a general increase in county denials during April, May and June, and a parallel increase in hearing grants during these last three months in the fiscal year." At pp. 17 and 27.

Dr. Briar read, analyzed, codified and compared statistically for the relationship among them, the 1,088 California fair hearing decisions rendered in 1965-1966.

10. California Department of Social Welfare, Circular Letter # 2064, November 1967 (R. 157-162).

"... it is clear that administrative 'accountability' is interpreted as a duty to avoid ineligibility rather than as a duty to make correct determinations. This produces a wasteful emphasis on over-investigating eligibility and a *tendency toward denying legitimate claims when any doubt exists.*"[11] [Emphasis added.]

In 35% of the California post-termination hearings decided between July 1, 1968 and March 30, 1969, the county decision to terminate was reversed.[12] A comprehensive study of all California Fair Hearing decisions rendered in 1965-1966 shows that over one-fifth (1/5) of all recipients were completely successful and one-third (1/3) of the decisions resulted in partial grants.[13]

Despite the fact that many recipients are erroneously terminated and are successful in Fair Hearings, there are relatively few Fair Hearings.[14]

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11. California State Assembly, *California Welfare: A Legislative Program for Reform*, February 1969, at p. 92.

12. The total number of reported hearings decided on all issues during this period was 1,528; twenty (20) hearings involved termination of aid. *Summary of All Fair Hearing Decisions* published by the California Department of Social Welfare; see also Bell and Norvelle, *Texas Welfare Appeals: The Hidden Right*, 46 Texas L. Rev. 223, 224 (1967), which showed that reversals in Texas Fair Hearings averaged 51% from 1958 ot 1966; Comment, *Eligibility Determinations in Public Assistance: Selected Problems and Proposals for Reform in Pennsylvania* 115 U. Pa. L. Rev. 1307, 1312-1313. (1967).

13. Briar, *Welfare Appeals Systems, Supra*, n. 9. It is significant to note that in the 1,088 decisions studied, Briar found that the rate of success of recipients was markedly higher in those cases where recipients had an authorized representative with them at the fair hearings. An average success rate of 63% occurred in cases where counsel was present; a 41% success rate for all represented clients as opposed to any overall success rate of 29%. Pp. 8-12.

14. The appeal rate in Old Age Security is 1.1 Fair Hearings per 1,000 active cases. In 1967, over 30,000 Old Age Security recipients were terminated, for reasons other than death, yet, there were only 363 Fair Hearings requested by the 291,348 Old Age Security re-

With regard to termination of benefits, one commentator has explained the failure to request later administrative review as follows:

> ". . . the brutal need of the recipient erroneously denied assistance will make him all the less able to pursue the subsequent [fair] hearing now available. Faced with the need to live somehow, he can scarcely devote the time and energy necessary to effectively show his continued eligibility on appeal. Because of this, it is hardly surprising that recipients rarely even request a hearing after the administrator stops payment." Comment: *Withdrawal of Public Welfare: The Right to a Prior Hearing,* 76 Yale L.J. 1234, 1244 (1967).

In this setting, more procedural safeguards than are provided by the informal conference are needed to insure that minimal food, clothing, and shelter will not be taken from recipients until they are found to be ineligible.

B. The Elements of Due Process Required in an Adjudicative Hearing Where Livelihood Is at Issue Are Lacking in the California Informal Conference.

It is now settled beyond a reasonable doubt that welfare procedures, as other governmental functions, are subject to constitutional demands. See, *e.g., Sherbert v. Verner,* 374 U.S. 398, 404 (1963); *Shapiro v. Thompson,* ..... U.S. ....., 89 S.Ct. 1322 (1969).

At the least, the Constitution demands that before a public official terminates or suspends welfare payments, he must

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cipients on all issues including termination. In all categorical public assistance programs the appeal rate, calculated on the basis of the average total number of recipients, was less than four per 1,000 active cases. The total number of Fair Hearings requested was 3,931. California Department of Social Welfare, *Public Welfare in California, Annual Statistical Report,* Tables 4, 5, and 61 (1967-68).

invoke procedures traditionally believed to protect against arbitrary governmental decision making. In the welfare context, no less than others, the protection of due process of law is elementary.

The lower court dismissed this action holding that the combination of the informal conference prior to termination and the Fair Hearing two months or more after termination would jointly create due process of law. Appellants seek the opportunity for an effective and timely Fair Hearing before termination (or, in the words of the HEW regulation, *infra*, pp. 25-26 "the continuation of aid pending the fair hearing"). The informal conference with a Welfare Department caseworker does not provide such a remedy and hearings provided months after termination cannot undo the harm done by the erroneous denial of a subsistence grant.

When dealing with essential interests such as the right to subsistence or the right to one's livelihood, adequate procedural protections must be required before action can be taken to withhold an individual's income unless a vital state interest exists. This proposition has most recently been recognized in the case of *Sniadach v. Family Finance Corporation*, 37 U.S. L.W. 4520 (June 9, 1969), where the court held that prejudgment garnishment is unconstitutional because notice and an opportunity to be heard were not given before the seizure of wages. The decision, voiding the prejudgment garnishment, was issued despite the fact that a limited procedure to challenge the garnishment was provided before trial.[15]

The Anglo-American legal tradition has always viewed the "hearing" process as necessary to protect against discretionary abuse, to correct harm before it is worked, and

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15. See Dissent of Mr. Justice Black at 37 U.S.L.W. 4520, 4522 and the decision of the Wisconsin Supreme Court, 37 Wisc. 2d 163, 154 N.W. 2d 259 (1967).

to avoid arbitrary erosion of individual rights. *Sniadach v. Family Finance Corporation, supra* at 4521 (concurring opinion, Mr. Justice Harlan). Welfare is no exception to this rationale; to the contrary, the dangers of error, abuse and invasion are greater due to the dependent relationship between the individual recipient and the Welfare Department. Indeed, the questions regarding eligibility and termination involve a host of individual factual determinations; determinations which customarily require a trial-type hearing.[16]

In the instant case appellants' interest in securing a Fair Hearing before termination is that of survival. On the other hand, the state apparently has no substantial interest in denying such a hearing prior to termination.[17] Of course, considerations of administrative need are relevant in the quest for a rational application of the Due Process Clause. However, this court has, on many occasions, noted that administrative convenience cannot be invoked to justify invasions of important legal rights where alternative and less harmful means are available. *Shapiro v. Thompson, supra; Cf., Harman v. Forsennius,* 380 U.S. 528, 542-43 (1965); *Carrington v. Rash,* 380 U.S. 89, 96 (1965); *Oyama v. California,* 332 U.S. 633, 646-47 (1948).

As a result of the decision in the state court case of *McCullough v. Terzian,* No. 379011 Cal. Super. Ct., Alameda

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16. Davis, *Administrative Law*, §§ 701-705 (1958 and Supp. 1965). Although such hearings may be informal, the more informal the proceeding the greater the need for basic procedural protections. *I.C.C. v. Louisville & Nashville R.R.*, 227 U.S. 88, 93 (1913).

17. The most apparent justification, that of protection of the fisc, has been rejected by appellees. In a document filed in the California District Court of Appeal in the case of *McCullough v. Terzian*, the California Attorney General stated that costs to California are not relevant to the question of whether California's informal conference meets due process. *Opposition to Introduction of Additional Evidence*, dated June 12, 1969, filed in Ct. of App. of Calif., 1st Dept., Div. 3 [1 Civ. No. 25830].

Cty., May 1968 (ruling the same informal conference to be unconstitutional), California has operated for over a year with a system allowing aid to continue pending the Fair Hearing decision. No substantial dislocation of the administrative agency has been experienced.[18] The California experience graphically undercuts the contention that a substantial state interest would be affected if aid continued pending the Fair Hearing. On the other hand, a review of the procedures at issue demonstrates that the informal conference lacks the most basic elements of due process.

1. THE INFORMAL CONFERENCE FAILS TO PROVIDE BASIC ELEMENTS OF DUE PROCESS FOUND BY THIS COURT TO BE CONSTITUTIONALLY REQUIRED IN CASES CALLING FOR ADJUDICATIVE HEARINGS.

a. Right to adequate notice.

Neither the notice nor time provided for preparation under the California regulation allows for a meaningful hearing.[19] To be constitutionally adequate the notice must clearly state the specific reasons for the action and must inform the recipient of the nature of the adverse evidence so as to enable him to adequately prepare for the hearing:

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity

18. Since the *McCullough* procedure came into effect, by the state's own figures, for the period September 20, 1968, to April 30, 1969 (eight months), 55 recipients in California had aid continued pending the Fair Hearing. California Department, Research and Statistics Division, *Restoration of Aid Payments Following Filing of Affidavit: Cases and Amounts of Monthly Payment by County*, Table B (May 6, 1969).

19. Indeed, the short period of time allowed for preparation before the conference underscores the point that the conference is nothing more than an adjustment procedure for obvious misunderstanding and a place where recipients can learn (for the first time) the basis for the county's action. Such a procedure may be administratively desirable but it cannot substitute for a hearing where serious factual disputes regarding eligibility for assistance can be adjudicated prior to the termination of a welfare grant.

> to know the claims of the opposing party and to meet them." *Morgan v. U.S.*, 304 U.S. 1, 18-19 (1938).

See also *Willner v. Committee on Character and Fitness*, at 373 U.S. 96, 107 (1962).

Notices issued in California pursuant to the present regulation contain as the complete reason for termination such statements as "Failure to cooperate," "Failure to provide essential information," "Discontinued due to increased personal property," or "You are no longer disabled." [See Appendix V, p. 21a for form of notice authorized by the regulation.] These notices are permitted by the regulation to arrive as little as three mail delivery days prior to the usual delivery date of a recipient's monthly check. It is impossible in this time to obtain legal representation, assemble witnesses, review the case record, and gather the facts and materials necessary for an adequate preparation of the recipient's case. In this regard, the amount of preparation needed for Mrs. Wheeler's conference is instructive [A. 21-22]. Yet, California gives a welfare recipient a minimum of two days to prepare to argue for her livelihood.

b. The right to cross-examine and confrontation.

There is no provision for cross-examination or confrontation in the informal conference even in cases where the Welfare Department is relying on third-party information for its decision to terminate. The right to cross-examine and confront in adjudicative hearings has been traditionally required by this court, particularly where there were important consequences to an individual, such as loss of livelihood. See *Greene v. McElroy*, 360 U.S. 474, 496-97 (1958) and cases cited therein; *Willner v. Committee on Character and Fitness, supra*, 103-104; *Cf., Hannah v. Larche*, 363 U.S. 420, 441-42 (1960); as well as the lower Federal courts, *Hornsby v. Allen*, 326 F.2d 605 (5th Cir.

1964); *Southern Stevedoring Co. v. Voris,* 190 F.2d 275 (5th Cir. 1951). The loss of a recurring subsistence grant is directly analogous to, and, if anything, more extreme, than deprivation of livelihood.

A frequently-cited formulation of the importance of confrontation and cross-examination appears in *Greene v. McElroy, supra,* where this court reviewed the procedure by which an individual had been deprived of his livelihood by removal of his security clearance. The court stated:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots." 360 U.S. at 496.

Even in cases where national security is involved and this court has been more reluctant to require the fullest form of confrontation, confrontation has, nonetheless, been considered critical. See, *e.g., Greene v. McElroy, supra.*

The necessity for such protection for welfare recipients is clear. Often information contained in case records is second or third-party hearsay and yet becomes the basis for the termination of welfare aid. For example in *Rios v. Hackney,* 294 F.Supp. 885, (N.D. Tex. 1967), a hearing officer confirmed the termination of aid on the basis of exclusively hearsay evidence. He found that the recipient

under the Texas' "substitute father" rule was cohabiting with a man not the legal father of her children. When this ruling was challenged, the Court's findings of fact showed:

"....

"(4) The only evidence before the examiner that plaintiff was cohabiting with a man as aforesaid was the written report of a public welfare caseworker in which it was related that several people had told the caseworker that plaintiff Modesta Rios was cohabiting with a man as aforesaid;

"(5) Plaintiff Modesta Rios denied the truth of the contents of the caseworker's report;

"(6) The persons who allegedly reported to the caseworker that plaintiff Modesta Rios was cohabiting with a man did not appear at the hearing and were not available for cross-examination by plaintiffs;"

From these facts the court concluded as a matter of law that:

"No evidence was adduced at the hearing conducted by the examiner upon which plaintiffs could reasonably be denied the relief sought therein;

"The action of the appellate board of the Texas Department of Public Welfare denying plaintiffs the relief sought was arbitrary and capricious;

"The evidence contained in the caseworker's report could not in any manner be relied upon as a basis for denying the relief sought in the absence of the plaintiffs being given an opportunity to cross-examine the person who made the statements contained in the report. *Hornsby v. Allen*, 5th Cir. 1964, 326 F.2d 605."[20] 294 F. Supp. at 886.

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20. Welfare terminations often involve factual determinations relating to third-party evidence and testimony. This is especially true where Aid to Families with Dependent Children families are discontinued because there is alleged to be a "man in the house." In Fair Hearings held subsequent to termination (where cross-examination and the subpoena power are available), 54% of the cases resulted in reversing county discontinuances of aid and restoration of grants to California recipients. Briar, *California Welfare System* at p. 18, *supra*, n. 9.

c. The right to an impartial decision maker.

The California regulation provides for an informal conference with the caseworker or another responsible person in the Welfare Department. In practice, the conference is almost always between the recipient and the same caseworker who made the initial decision to terminate welfare payments. [For example, see the informal conference provided Mrs. Wheeler (A. 21-22) and the informal conference given Mrs. McCullough (Jurisdictional Statement, Appendix G, pp. 27a-28a).] On occasion, the caseworker's direct supervisor, who has previously confirmed the decision to terminate, participates in the conference procedure.

Contrary to the view of appellees, social workers do not have interests coincident with their clients, particularly where a factual dispute exists. Indeed, the relationship between recipients and social workers is often less than cordial.[21] Appellees argued in the court below that personnel within local welfare departments could perform the several functions of caseworker, supervisor and impartial arbiter.[22] If the local department performs these functions, at the very least there must be separation of function and lack of prior involvement in the initial decision to terminate. This principle of separation of function finds clear expression in the HEW Fair Hearing. Federal Handbook, Part IV, Section 6300(h). So important is the principle to administrative fairness that Mr. Justice Jackson in *Wong Yang*

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21. Supra, n. 6.

22. But see *In re Murchison*, 349 U.S. 133, 136-37 (1955), where this court recognizes that due process requires a referee who is not both investigator and judge, arbiter and advocate in the same cause.

Sung v. McGrath, 339 U.S. 33, 41-45 (1950) said that it was the basic purpose and principal contribution of the Administrative Procedure Act.[23]

d. Other elements of due process.

The California regulation lacks other elements of due process usually found in administrative hearings. It fails to require that a decision be based upon the evidence at the hearing[24] or that there even be a decision;[25] it fails to provide for any transcript or record of any sort of the proceeding[26] and it fails to place the burden of proof on the Welfare Department. (On the contrary, the burden is upon the recipient to prove she is entitled to a continuation of public assistance.)[27]

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23. In *Kelly v. Wyman*, 294 F. Supp. 893, 907 (S.D.N.Y. 1968), the three-judge court recognized that some prior involvement might be permissible, but under no circumstances would the *Kelly* court have constitutionally approved a regulation authorizing a client's caseworker or supervisor to preside at the informal conference.

24. *I.C.C. v. Louisville & Nashville R.R.*, 227 U.S. 88, 91 (1913).

25. Under the terms of the California regulation, the informal conference is "held . . . *to discuss the entire matter informally for purposes of clarification, and where possible, resolution.*" (Emphasis added.) PSS 44-325.434(c). Thus, if the matter cannot be clarified or if a factual dispute still exists, aid will not continue pending the Fair Hearing but will be terminated.

26. See *Kwock Jan Fat v. White*, 253 U.S. 455, 464 (1913). A record is needed to protect against arbitrary action, particularly where a hearing decision is subject to judicial review which, of course, would be the case if appellants prevailed and a single effective hearing was provided prior to termination.

27. The regulation specifically requires the recipient to carry the burden of re-establishing eligibility for welfare assistance. Once a person has been found eligible for assistance that individual has a statutory right to assistance promptly and without interruption. *Smith v. King*, 277 F. Supp. 31, 38-40 (1967), *aff'd* 392 U.S. 309 (1968). Such a right is meaningless if it can be destroyed by an initial *ex parte* decision to terminate aid, thereby once again placing the burden of proof on the recipient.

In short, to simply denominate the informal conference procedure, a "hearing" does not make it a hearing that conforms to the requirements of the Due Process Clause.[28]

2. DUE PROCESS PRINCIPLES ESTABLISHED BY THIS COURT HAVE BEEN APPLIED BY A GROWING NUMBER OF LOWER COURTS TO REQUIRE A FULL AND ADEQUATE ADJUDICATIVE HEARING BEFORE TERMINATION OF WELFARE ASSISTANCE.

A growing number of lower courts have found, contrary to the holding of the court below, that essential constitutional protections such as adequate and specific notice, the right to confront and cross-examine, and the right to an impartial tribunal, are required in a hearing before termination of welfare assistance. See, *e.g., Kelly v. Wyman, supra; McCullough v. Terzian, supra* (decision set out in full in Jurisdictional Statement, Appendix H, pp. 30a-33a, holding the challenged California informal regulation to be violative of due process); *Robertson v. Born,* Civil Action No. 51364, (N.D. Cal., June 21, 1969) (ordering a full hearing prior to termination of county welfare grants).[29]

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28. The authors of a recent law journal article concluded after extensive research that a public assistance hearing must contain, at a minimum, the following elements: Notice, discovery, right to counsel, oral hearing, confrontation, cross-examination, impartial tribunal, decision on the record and judicial review. Burrus and Fessler, *Constitutional Due Process Hearing Requirements in the Administration of Public Assistance; The District of Columbia Experience,* 16 Am. U.L. Rev. 199, 218 (1967); see also Note: *Withdrawal of Public Welfare: The Right to a Prior Hearing,* 76 Yale L.J. 1234, 1239 (1967).

29. In addition to the cases cited above, a number of courts have required that welfare assistance must continue pending the HEW Fair Hearing. *Machado v. Hackney,* Civ. Action No. 68-108-SA (W.D. Texas, May 12, 1969); *Moore v. Houston,* No. 104435 (Mich. Cir. Ct., Wayne Cty., Nov. 1, 1968); *Camerena v. Dept. of Public Welfare,* No. 1 CA-CIV 719 (Ariz. Ct. of App., Div. 1, filed Jan. 28, 1969). After suits were filed in Mississippi (*Williams v. Gandy,* Civ. No. G.C. 6728, N.D. Miss., filed June 9, 1967), and Massachu-

These procedural protections are also found in the HEW Fair Hearing. Specifically, the Fair Hearing contains the following basic elements: Review of the local determination by an impartial official of the state welfare department; complete and effective notice; the decision to be based solely on the evidence adduced at the hearing; adequate time for discovery and inspection; opportunity to question or refute testimony or evidence and a prompt decision. HEW, Federal Handbook, Part IV, §§ 6200, *et seq.* (set out in full in Appendix II, pp. 3a-13a).

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setts (*Diaz v. Dunn*, No. 68411, D.C. Mass., filed May 15, 1968), the state welfare departments adopted a regulation authorizing the continuation of assistance pending the Fair Hearing. Finally, three-judge courts have been convened in several other states. *See, Van Blaricum v. Dept. of Public Welfare of the State of Ohio*, No. 68-78 (S.D. Ohio, May 5, 1968); *Lage v. Downing*, C.A. No. 7-2089-C-2 (S.D. Iowa, 1968); *Sims v. Juras*, No. 69-238 (D.C. Ore., April 30, 1969); *Miller v. Zoeller*, No. 69-C-2 (W.D. Wis., order filed Jan. 20, 1969); and see, *Bible v. Smith*, No. 706263 (Wash. Super. Ct., March 18, 1969).

II

CONTINUATION OF WELFARE ASSISTANCE PENDING A FAIR HEARING DECISION IS REQUIRED BY THE SOCIAL SECURITY ACT.

Appellants strongly urge that the court should reach and decide the important constitutional issues raised by this case. However, the relief appellants seek can be achieved by a proper interpretation of the Social Security Act.

The Social Security Act's guarantee of a Fair Hearing to all categorical aid recipients can reasonably be construed to require the opportunity for a Fair Hearing prior to the termination of welfare assistance.[30]

HEW has so construed the Social Security Act to require the continuation of aid pending the Fair Hearing decision. *Cf., Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268, 281-83 (1969). Recently, HEW issued the following regulation which states in pertinent part (set out in full in Appendix II, p. 3a).

"Effective October 1, 1969, a State plan for OAA, AFDC, AB, APTD, AABD, or MA under the Social Security Act must provide that:

> "(1) When a fair hearing is requested because of termination or reduction of assistance, involving an issue of fact, or of judgment relating to the individual case between the agency and the appellant, assistance will be continued during the period of the appeal and

30. For the federally-supported welfare programs, Aid to Families with Dependent Children, Old Age Security, Aid to the Totally Disabled, and Aid to the Blind, every state must provide an opportunity to recipients for a Fair Hearing to contest the denial or termination of aid. 42 U.S.C.A. §§ 302(a)(4), 602(a)(4), 1202(a)(4), and 1382(a)(4) (1964).

> "[A state OAS plan must . . .] . . . provide for granting opportunity for a fair hearing before the State agency to any individual whose claim for assistance under the plan . . . is denied or is not acted upon with reasonable promptness." 42 U.S.C.A. § 302(a)(4).

through the end of the month in which the final decision on the fair hearing is reached. (If assistance has been terminated prior to timely request for fair hearing, assistance will be reinstated.) Where delays are occasioned during the period of the appeal, assistance will be continued if the delay is at the instance of the agency or because of illness of the claimant or for other essential reasons. To the extent that there are other delays at the request of the claimant the agency may but is not required to continue assistance." (Vol. 34, Fed. Reg., No. 16, p. 1144, Jan. 23, 1969.)[31]

HEW adopted this regulation after extensive analysis and review of the needs of recipients and the welfare departments, and after soliciting the views of interested members of the public.[32] The regulation is consistent with the purposes of the Social Security Act, with the constitutional mandate that Fair Hearings satisfy the standards of due process appropriate to the situation, and with Part IV, Section 6400(a) of the Federal Handbook which intends that the Fair Hearing be subject to the requirements of due process. The purpose of the Social Security Act is to promote the economic and psychological self-sufficiency of those who must be dependent on public aid. See 42 U.S.C. §§ 601 and 1351 (1964). Arbitrariness in public administration is a debilitating force which makes for servility or alienation in those who are subject to it. Such a result is repugnant to the Social Security Act.

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31. HEW provides for Federal reimbursement to states granting welfare assistance pending a Fair Hearing decision. Federal Handbook, Part IV, § 6500(b).

32. The regulation was originally issued in proposed form on November 30, 1968 (33 Fed. Reg. at 17853), with a proposed effective date as of July 1, 1969. When the regulation was finally adopted the effective date was set back to October 1, 1969, presumably to allow those states where no such system existed to adapt to the new procedure.

A reasonable construction is that the Fair Hearing requirements of the Social Security Act mean a hearing held at a time meaningful to the preservation of the claimant's subsistence, *i.e.*, prior to termination of assistance. Such an interpretation would be consistent with due process considerations underlying construction of statutes open to interpretation. See *Wong Yang Sung v. McGrath*, 339 U.S. 33, (1949), particularly pp. 48-51; *Greene v. McElroy*, 360 U.S. 474, 507-508 (1958); *King v. Smith*, 392 U.S. 309, 334 (1968). Indeed, a three-judge court has recently decided continuation of aid pending a Fair Hearing decision is required by the Social Security Act. *Machado v. Hackney*, Civ. Action No. 68-108-SA (W.D. Texas, May 12, 1969).[33]

CONCLUSION

Due process protections in the welfare context are essential. The recipient's dependency on the welfare agency, her lack of resources, her inability to effectively articulate her position, the factual nature of the issues presented, and the extent of the injury which a recipient will suffer, must all be considered in determining the extent to which procedural safeguards are required. As Mr. Justice Frankfurter noted in his concurring opinion in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951):

> "The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is

33. It is clear that state statutes or regulations inconsistent with the Social Security Act or HEW regulations are invalid *King v. Smith, supra.*

challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment." 341 U.S. at 163.

The informal conference is not scheduled at a designated time, or with a designated representative of the Welfare Department. The informal conference does not provide adequate notice. Serious factual questions are raised and determined at the informal conference with no advance opportunity for the recipient to know the precise grounds for termination, nor the source of the evidence supporting termination. No right to cross-examination is afforded; there is no transcript of the informal conference; and no requirement that the decision, if rendered at all, be rendered by someone other than the person who made the original decision to terminate, or be based upon the evidence presented at the informal conference. Thus, the informal conference hardly rises to the dignity of due process of law. To afford a hearing long after the injury has been done to the recipient does not remedy the constitutional infirmity.

The Social Security Act can be interpreted to require the continuation of welfare assistance pending the Fair Hearing thus providing recipients with a realistic and effective remedy prior to termination. As Professor Charles A. Reich has written:

> "In a society where a significant portion of the population is dependent on social welfare, decisions about eligibility for benefits are among the most important that a government can make. By one set of values the granting of a license to broadcast over a television channel, or to build a hydroelectric project on a river, might seem of more far-reaching significance. But in a society that considers the individual as its basic unit, a decision affecting the life of a person or a family

should not be taken by means that would be unfair for a television station or power company. Indeed, full adjudicatory procedures are far more appropriate in welfare cases than in most of the areas of administrative procedure." Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 Yale L.J. 1245, 1253 (1965).

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

PETER E. SITKIN
STEVEN J. ANTLER
SIDNEY M. WOLINSKY
CHARLES STEPHEN RALSTON
Attorneys for Appellants

EDWARD V. SPARER
MICHAEL S. ZOLA
WINTON D. WOODS JR.
Of Counsel.

APPENDIX I

Excerpts from the Social Security Act of 1935, as amended, 42 U.S.C. § 302(a)(4) et seq.

§ 302(a)(4)

(a) A State plan for old-age assistance, or for medical assistance for the aged, or for old-age assistance and medical assistance for the aged must—

(4) Provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for assistance under the plan is denied or is not acted upon with reasonable promptness . . .

§ 602(a)(4)

(a) A State plan for aid and services to needy families with children must—

(4) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim is denied or is not acted upon with reasonable promptness; . . .

1202(a)(4)

(a) A State plan for the blind must—

(4) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for aid to the blind is denied or is not acted upon with reasonable promptness; . . .

1382(a)(4)

(a) A State plan for aid to the aged, blind, or disabled, or for aid to the aged, blind, or disabled and medical assistance for the aged must—

(4) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for aid or assistance under the plan is denied or is not acted upon with reasonable promptness; . . .

APPENDIX II

Excerpts from 25 C.F.R. § 205.10, and from Part IV of The Handbook of Public Assistance Administration, United States Department of Health, Education and Welfare.

1. 25 C.F.R. § 205.10:

Fair Hearings: Legal Services; Continuing Assistance

(a) STATE PLAN REQUIREMENTS: Effective October 1, 1969, a State plan for OAA, AFDC, AB, APTD, AABD, or MA under the Social Security Act must provide that:

(1) When a fair hearing is requested because of termination or reduction of assistance, involving an issue of fact, or of judgment relating to the individual case, between the agency and the appellant, assistance will be continued during the period of the appeal and through the end of the month in which the final decision on the fair hearing is reached. (If assistance has been terminated prior to timely request for fair hearing, assistance will be reinstated.) Where delays are occasioned during the period of appeal, assistance will be continued if the delay is at the instance of the agency or because of illness of the claimant or for other essential reasons. To the extent that there are other delays at the request of the claimant the agency may but is not required to continue assistance.

2. Federal Handbook, §§ 6200, et seq.:

6200. *Requirements for State Plans*

A State plan for OAA, AFDC, AB, APTD, or AABD must provide that:

(a) The State agency will be responsible for fulfillment of fair hearings provisions, and shall specify the hearing authority.

(b) An opportunity for a fair hearing before the State agency will be granted to any individual requesting a hearing because his claim for assistance is denied,

is not acted upon with reasonable promptness, or because he is aggrieved by any other agency action affecting his receipt or termination of assistance, or by agency policy as it affects his situation.

(c) Decisions by the hearing authority, rendered in the name of the State agency, will be binding on the State and local agency. The State agency will establish and maintain a method for informing, at least in summary form, all local agencies of all fair hearing decisions by the hearing authority, and the decisions will be accessible to the claimants, their representatives, and the public (subject to provisions relating to safeguarding public assistance information).

(d) The hearings will be conducted by an impartial official (or officials) of the State agency.

(e) Hearing procedures will be issued and publicized by the State agency for the guidance of all concerned.

(f) Every claimant will be informed in writing at the time of application and at the time of any agency action affecting his claim

(1) of his right to a fair hearing;

(2) of the method by which he may obtain a hearing;

(3) that he may be represented by others including legal counsel; and

(4) of any provision for payment of legal fees by the agency.

(g) The hearing will be conducted at a time, date, and place convenient to the claimant, and adequate preliminary written notice will be given.

(h) When the hearing involves medical issues, a medical assessment other than that of the person or persons involved in making the original decision will be obtained and made a part of the record if the hearing officer or the appellant considers it necessary.

(i) The claimant or his representative will have the opportunity

(1) to examine all documents and records used at the hearing;

(2) at his option, to present his case himself or with the aid of others, including legal counsel;

(3) to bring witnesses;

(4) to establish all pertinent facts and circumstances;

(5) to advance any arguments without undue interference; and

(6) to question or refute any testimony or evidence.

(j) Prompt, definitive, and final administrative action will be taken within 60 days from the date of the request for a fair hearing. The claimant will be notified of the decision, in writing, in the name of the State agency and, to the extent it is available to him, of his right to judicial review.

(k) When the hearing decision is favorable to the claimant, or when the agency decides in favor of the claimant prior to the hearing, the agency will make the corrected payments retroactively to the date the incorrect action was taken.

(l) The hearing officer's (or panel's) recommendations shall be based exclusively on evidence and other material introduced at the hearing. The verbatim transcript of testimony and exhibits, or an official report containing the substance of what transpired at the hearing, together with all papers and requests filed in the proceeding, and the hearing officer's or panel's recommendations, will constitute the exclusive record for decision by the hearing authority and will be available to the claimant at a place accessible to him or his representative at any reasonable time.

6300. *Criteria for the Administration of the Plans*

(a) The State agency establishes policies and procedures that carry out the purpose and provisions of

this policy and that assure equity of treatment in relation to the laws and standards pertaining to assistance.

The State agency takes the necessary steps to see that there is uniformity in the application of agency policy in similar situations.

(b) A request for a hearing is considered as any clear expression (oral or written) by the claimant (or person acting for him, such as his legal representative, relative, or friend) to the effect that he wants an opportunity to present his case to higher authority. The freedom to make such a request is not limited or interfered with in any way, and agency emphasis will be on helping the claimant in submitting and processing his request, and in preparing his case, if needed.

(c) Opportunity for a fair hearing includes:

(1) Consideration of any action, or failure to act with reasonable promptness, on a claim for assistance which includes undue delay in reaching a decision on eligibility or in making a payment, refusal to consider a request for or undue delay in making an adjustment in payment, and suspension or discontinuance of assistance in whole or in part;

(2) Consideration of the agency's interpretation of the law, and the reasonableness and equitableness of the policies promulgated under the law, if the claimant is aggrieved by their application to his situation;

(3) Consideration of agency decisions regarding:

(i) Eligibility for assistance in both initial and subsequent determinations,

(ii) Amount of assistance or change in payments,

(iii) The manner or form of payments, including restricted or protective payments, even though no Federal financial participation is claimed, and

(iv) Conditions of payments, including work requirements.

(d) Provision is made for reasonable time in which to appeal agency action.

(e) Final administrative action is taken within the 60-day limit (IV-6200, item j), except that where the claimant requests a delay in the hearing in order to prepare his case or for other essential reasons, reasonable time is given and such extra time may be added to the 60 days.

(f) The agency does not deny or dismiss a request for a hearing except where it has been withdrawn by the claimant in writing or abandoned.

A request for a hearing is considered abandoned only if neither the claimant nor his representative appears at the time and place agreed upon for the hearing and if within a reasonable time after the mailing of an inquiry as to whether he wishes any further action on his request for a hearing, no reply is received by either the local or State agency.

(g) The hearing authority may be the highest executive officer of the State agency, a panel of agency officials or a hearing officer appointed for that purpose, but no person who participated in the local decision being appealed will participate in a final administrative decision on such case. The hearing authority is responsible for a final administrative decision in the name of the State agency on all issues that have been the subject of a hearing. The decision of the hearing authority is binding on the State and local agency. The State agency is responsible for seeing that the decision is carried out promptly.

Insofar as may be applicable, a decision in favor of the claimant applies retroactively to the date the incorrect action was taken, and also applies prospectively.

(h) The impartial official (or officials) of the State agency who is responsible for conducting the hearing has not been involved in any way with the action in question.

(i) The issuance of hearing procedures is in the form of rules and regulations, or in some other form in which they will be publicized.

(j) Written notification and, to the extent possible, oral explanation of the right to and procedure for requesting a fair hearing are given at the time of application. Written notice, and oral explanation as necessary, are given at the time of any agency action affecting the claim for assistance, including change in or termination of assistance.

(k) Individuals are informed of their right to be represented at fair hearings by others. At his option, the claimant may be represented by legal counsel or by a relative, friend or other spokesman, or may represent himself.

(l) The convenience of the claimant is considered in setting the date, time and place for the hearing. Notice is given in writing with adequate preliminary information about the hearing procedure necessary for his preparation for the hearing and effective presentation of his case. He is advised as to the use of witnesses and legal counsel or other representative, as well as any procedure or financial provisions for obtaining legal representation, including availability of fees for legal counsel from the agency.

(m) When an assessment by a medical authority, other than the one involved in the decision under question, is requested by the claimant, it is obtained, at agency expense, from a medical source satisfactory to the claimant. The hearing officer can also consider the physician's report in the record or can request additional evidence. The assessment of such medical authorities will be reported in writing or by personal testimony as an expert witness for the hearing record.

(n) The claimant or his representative has adequate opportunity to examine material that will be introduced as evidence prior to the hearing as well as during the hearing, to give all the evidence on points at

issue he believes necessary without undue interference, to as for substantiation of any statements made by others, and to present evidence in rebuttal.

(o) Non-record or confidential information which the claimant does not have an opportunity to hear or see is not made a part of the hearing record or used in a decision on the appeal. The hearing officer does not review the case record, or other material prior to the hearing unless such material is made available to the claimant or his representative.

6400. *Interpretation*

(a) *Opportunity for a Fair Hearing*

Fair hearing procedures, including the conduct of the hearing, are designed to assure the right of every claimant to demand and obtain a fair hearing. The claimant's freedom to request a hearing, whenever he believes that proper consideration has not been given to all the circumstances surrounding his claim, is a fundamental right and is not to be limited or interfered with in any way.

Since, under the Federal act and the State plan, every aggrieved claimant is entitled to the opportunity for a hearing, only the claimant may withdraw his request for a hearing and this is to be in the form of a written withdrawal.

Effective complaint and adjustment procedures, whereby corrective action may be easily requested and readily taken without the need for a hearing, are necessary, when indicated. Advance opportunity afforded the recipient to respond to questions which could result in change of grant or termination is a significant part of such procedures. So is written, and whenever practical, oral information of the reasons for change, denial, or termination. This is particularly important where the agency decision is based on judgmental factors or eligibility requirements that entail evaluative

decisions on the part of workers, as compared to decisions based on non-debatable facts (such as receipt of OASI, death, etc.). However, the State and local agency adjustment procedures cannot be allowed to interfere with the hearing process.

The claimant's right to a hearing includes the privilege of presenting his case in any way he desires. Some will wish to tell their story in their own way, some will desire to have a relative or friend present the evidence for them, and still others will want to be represented by legal counsel. In many instances the recipient's position can best be presented by an attorney. In order for the claimant to obtain an attorney, legal fees may need to be provided by the State. Federal financial participation is available in meeting the cost of these fees. States are urged to provide payment for the services of an attorney, or refer recipients to attorneys otherwise available in the community, because of the skill and knowledge of the legal profession in these matters. Furthermore, the claimant may bring any witnesses he desires to help him establish pertinent facts and to explain his circumstances.

The hearing is conducted in an informal rather than formal court-type procedure in order to serve the best interests of the claimant; however, the hearing is to be subject to the requirements of due process.

(b) *Publication of Hearing Procedures*

The publicaton of hearing procedures in the form of rules and regulations or a clearly stated pamphlet helps to emphasize the importance of the procedure. This material is useful to applicants and recipients or to others interested in their behalf. It contributes to the fairness of the hearing procedure, and emphasizes that there is "due process" in program administration affecting the right to public assistance.

(c) *Informing the Claimant of His Right to a Hearing*

Written notification of the right to a hearing may be on the application form and other forms routinely used by the agency which go to applicants and recipients, as well as an explanatory pamphlet distributed by the agency. Oral explanations should also be given regarding the policy on hearings at intake and at time of a change in eligibility.

The purpose of informing the claimant of his right to a hearing, in writing, and whenever practicable orally, is to assure that the claimant fully understands this right. This right is further assured by the agency explaining the right to a hearing in understandable terms and in being helpful as needed in the preparation for and conduct of the hearing.

(d) *Convenience of the Claimant Considered*

The agency has not discharged its responsibility for a hearing unless it has taken all steps necessary to enable a claimant who requested a hearing to attend the hearing in person or to be represented by a person of his own choosing. If the hearing is to be held at a considerable distance from the locality of the claimant's residence, it may be necessary to provide for the transportation and other costs of the claimant, his representative, and his witnesses.

Notice to claimant as to the hearing being scheduled in his behalf includes information about the fair hearing as an informal administrative procedure, in which a dissatisfied claimant or his representative may present his grievance with the help of witnesses or legal representation to show why action or inaction in his case should be corrected by the State agency.

(e) *Impartiality of Official Conducting the Hearing*

The person conducting the hearing shall not have been connected in any way with previous actions or decisions on which the appeal is made. For example, a

field supervisor who has advised the local agency in the handling of a case would be disqualified from acting as the hearing officer.

(f) *Impartiality of the Hearing Authority*

The hearing authority shall not have been directly connected with the agency action about which the claimant is appealing.

(h) *Opportunity to Examine the Official Record*

The record of the proceedings at the hearing, which constitute the official record, is to be made available to the claimant or his representative to examine, if he desires. If any additional material is made a part of the hearing record, this, too, would be made available.

(i) *Judicial Review*

In some States, the right of judicial review may be prescribed by statute specifically authorizing review of the agency decision on the basis of the record of administrative proceedings. In other States, even in the absence of statutory provisions, a claimant may be able to invoke the remedy of judicial review on the showing that the agency action was "unreasonable, arbitrary, or capricious." The content of the notice of decision, as regards judicial review, would depend upon the kind of remedy available in the State.

6500. *Federal Financial Participation*

Federal financial participation is available in:

(a) Payments made to carry out hearing decisions, or to take corrective action prior to the hearing, including corrected payments retroactively to the date the incorrect administrative action was taken.

(b) Payments of assistance continued pending a hearing decision.

(c) Administrative costs necessary for:

(1) Carrying out the hearing procedures;

(2) Providing transportation and other costs for the claimant, his representative and witnesses to and from the place of the hearing;

(3) Fees for legal counsel; and

(4) Other costs, expenditures, and fees reasonably related to the hearing, including expenses involved in obtaining an additional medical assessment.

APPENDIX III

California Welfare and Institutions Code

1. Statutes Governing Termination of Old Age Security.

§ 12200. Grounds; report of suspension; effect of eligibility for medical assistance. The county may for cause, and upon instructions so to do by the department, shall cancel, suspend, or revoke aid. Upon request of the department, an immediate report of every suspension shall be made to the department stating the reason for the suspension and showing the action of the board of supervisors in approving the suspension.

Eligibility for medical assistance for the aged does not constitute cause for retroactive cancellation, suspension, or revocation of aid.

§ 12201. Notice to recipient. If the board of supervisors, in accordance with Section 12200, cancels, suspends, or revokes aid, the recipient shall be immediately notified in writing of the county's action, the date thereof, and of the reason therefor and the recipient's right to appeal therefrom.

2. Fair Hearing Statutes.

§ 10950. Opportunity; recipient defined. If any applicant for or recipient of public social services is dissatisfied with any action of the county department relating to his application for or receipt of aid or services, or if his application is not acted upon with reasonable promptness, or if any person who desires to apply for such aid or services is refused the opportunity to submit a signed application therefor, and is dissatisfied with such refusal, he shall, in person or through an authorized representative, without the necessity of filing a claim with the board of supervisors,

upon filing a request with the department, be accorded an opportunity for a fair hearing.

As used in this chapter, "recipient" means an applicant for or recipient of aid or services except aid or services exclusively financed by county funds.

§ 10951. Request; time. No person shall be entitled to a hearing pursuant to this chapter unless he files his request for the same within one year after the order or action complained of.

§ 10952. Setting; notice. The department shall set the hearing to commence within 45 days after the request is filed, and, at least 10 days prior to the hearing, shall give all parties concerned written notice of the time and place of the hearing.

§ 10953. Conduct. A hearing under this chapter shall be conducted by referees employed by the department, unless the director orders that it shall be conducted by himself or by the administrative adviser of the department in behalf of the director.

§ 10954. Powers of person conducting. The director, administrative adviser, or referee, in conducting the hearing, shall have all of the powers and authority conferred upon the head of a department in Article 2 (commencing with Section 11180) of Chapter 2 of Part 1 of Division 3 of Title 2 of the Government Code.

§ 10955. Impartiality; informality; evidence; appearance; counsel. The hearing shall be conducted in an impartial and informal manner in order to encourage free and open discussion by participants. All testimony shall be submitted under oath or affirmation. The person conducting the hearing shall not be bound by rules of procedure or evidence applicable in judicial proceedings. At the hearing the appli-

cant or recipient may appear in person with counsel of his own choosing, or in person and without such counsel.

§ 10956. Perpetuation of proceedings. The proceedings at the hearing shall be reported by a phonographic reporter or otherwise perpetuated by mechanical, electronic, or other means capable of reproduction or transcription.

§ 10957. Continuance; commencement of payments on award of aid. The person conducting the hearing, upon good cause shown, may continue the hearing for a period of not to exceed 30 days. When the refusal of a county to accept a signed application for aid or services is an issue, the director may require the county to accept the application, and may continue the case until the results of the investigation have been reported to him. In any such case in which aid is awarded by the director, the payments shall commence at the time indicated by the director.

§ 10958. Referee; proposed decision. If the hearing is conducted by a referee, he shall prepare a proposed decision, in writing and in such form that it may be adopted as the decision in the case, and, after approval of the decision by the chief referee of the department, shall file a copy of the proposed decision, within 75 days after the conclusion of the hearing, with the director.

§ 10959. Director's powers after receipt of proposed decision; rehearing. Within 30 days after receiving a copy of the referee's proposed decision, the director may adopt the decision in its entirety; decide the matter himself on the record, including the transcript, with or without taking additional evidence; or order a rehearing to be conducted by himself, the administrative adviser of the department or another referee in behalf of the director. If the director decides the matter, a copy of his decision shall be served on the applicant or recipient and on the affected county,

and, if his decision differs materially from the proposed decision of the referee, a copy of that proposed decision shall also be served on the applicant or recipient and on the affected county. If a rehearing is ordered, it shall be conducted in the same manner and within the same time limits specified for the original hearing.

§ 10960. Request for rehearing; time; ruling; conduct. Within 30 days after adoption by the director of the proposed decision of a referee or the issuance by the director of his own decision, the affected county or applicant or recipient may file a request with the director for a rehearing and the director, within 10 days after receipt of the request, shall grant or deny the request. If the director grants the request, the rehearing shall be conducted in the same manner and subject to the same time limits as the original hearing.

§ 10961. Director's decision; contents; effect. The decision of the director need not specify the amount of the award to be paid unless the amount of the award is an issue. If the decision is in favor of the applicant or recipient, the county department shall pay to the applicant or recipient, without the necessity of establishing his present need, the amount of aid he is entitled to receive pursuant to the director's decision, payment to commence as of the date the person was first entitled thereto, or grant to him the services to which the director finds he is entitled.

§ 10962. Judicial review. After having exhausted the administrative remedy provided for in Section 10960, the applicant or recipient or the affected county, within one year after receiving notice of the director's final decision, may file a petition with the superior court, under the provisions of Section 1094.5 of the Code of Civil Procedure, praying for a review of the entire proceedings in the mat-

ter, upon questions of law involved in the case. Such review, if granted, shall be the exclusive remedy available to the applicant or recipient or county for review of the director's decision. The director shall be the sole respondent in such proceedings.

No filing fee shall be required for the filing of a petition pursuant to this section. Any such petition to the superior court shall be entitled to a preference in setting a date for hearing on the petition. No bond shall be required in the case of any petition for review, nor in any appeal therefrom. The applicant or recipient shall be entitled to reasonable attorney's fees and costs, if he obtains a decision in his favor.

§ 10963. Compliance with decision. The county director shall comply with and execute every decision of the director rendered pursuant to this chapter.

§ 10964. Digest of decisions. The department shall compile and distribute to each county department a current digest of decisions, properly indexed, rendered under this chapter, and each such digest shall be open to public inspection, subject, however, to the confidentiality requirements set forth in federal and state laws and regulations.

§ 10965. Request on behalf of decedent's estate. Nothing in this chapter shall prevent the filing of the request for a hearing by the legal representative, or, if there is no authorized legal representative, by an heir of a deceased applicant or recipient, in behalf of the decedent's estate, to the end that rights not determined at the time of death shall accrue to the estate of the applicant or recipient.

APPENDIX IV

Excerpts from California Regulations for Withholding Welfare Payments Establishing "Informal Conference" Effective April 1, 1968.

California State Department of Social Welfare, Public Social Services Manual:

44-325 CHANGES IN AMOUNT OF PAYMENT

.43 *Notification to Recipient When Aid Payment is Withheld* (AB, ATD, OAS, AFDC)

The recipient, the parent or other person responsible for the child in *AFDC,* shall be notified, in writing, immediately upon the initial decision being made to withhold a warrant beyond its usual delivery date for any reason other than death, and in no case less than three (3) mail delivery days prior to the usual delivery date of the warrant to the recipient. The county shall give such notice as it has reason to believe will be effective including, if necessary, a home call by appropriate personnel. Form ABCD 239, Notice of Action, or a substitute form, may be used for this purpose. Every notification shall include:

.431 A statement setting forth the proposed action and the grounds therefor, together with what information, if any, is needed or action required to re-establish eligibility or to determine a correct grant.

.432 Assurance that prompt investigation is being made; that the withheld warrant will be delivered as soon as there is eligibility to receive it; and that the evidence or other information which brought about the withholding action will be

freely discussed with the recipient, parent, or other person, if he so desires (see Section .434 below).

.433 A statement of whether, if aid is withheld, the recipient will or will not continue to be certified for medical assistance during the month aid is withheld.

.434 A statement that the recipient, parent, or other person may have the opportunity to meet with his caseworker, an eligibility worker, or another responsible person in the county department, at a specified time, or during a given time period which shall not exceed three (3) working days, and the last day of which shall be at least one (1) day prior to the usual delivery date of the warrant, and at a place specifically designated in order to enable the recipient, parent, or other person:

(a) To learn the nature and extent of the information on which the withholding action is based;

(b) To provide any explanation or information, including, but not limited to that described in the notification pursuant to Section .431 above;

(c) To discuss the entire matter informally for purposes of clarification and, where possible, resolution.

APPENDIX V
Form of Notice

STATE OF CALIFORNIA

NOTICE OF ACTION

DEPARTMENT OF SOCIAL SERVICES
585 Bush Street
San Francisco, California 94108

TYPE OF AID:
DATE: 5/28/69

Dear Mrs. [name deleted]

Your Aid to the Needy Disabled has been **discontinued** effective **May 30, 1969** because **you are no longer disabled.**

This action (if a discontinuance of aid) is based on the following specific state policy:

It is not necessary for you to see us about this notice unless there are facts relating to your needs and/or income or facts which may otherwise affect your eligibility that you have not reported to us. If you have a question about this action and wish to discuss it, please telephone or write to us. We will answer your question or make an appointment to see you in person.

Sincerely,

558-5504

.....
(Telephone Number)

(Mrs.) I. MILLS

.....
Social Worker
UNIT No. 35

ABCD 239 (7/68)
(Denied and Held Applications; Withheld, Canceled and Discontinued Aid Payments; Intra-program Status Change; and Supplemental Payments)

(Reverse side of form)

IMPORTANT INFORMATION

If you have any questions or you desire further information:

1. You may get in touch with your social worker who will be glad to discuss any questions with you. All facts and any further information you wish to present will be given careful consideration. If an adjustment is in order, it will be made.

2. You may inform the State Department of Social Welfare if you have a complaint by going in person, or writing to that office. The department will then notify the County Welfare Department. Upon receipt of such notification the County Welfare Department will review the facts in your case. If they determine that you are entitled to an adjustment, it may be possible to settle your complaint without further action on your part.

3. You may request a fair hearing and a decision by the Director of the State Department of Social Welfare. Such request must be in writing. A letter is sufficient but you must state that you want a hearing and tell why you are dissatisfied. A request for a hearing should be sent to the area office of the State Department of Social Welfare nearest your home. Area offices of the State Department of Social Welfare are located at:

   Los Angeles—State Office Bldg. No. 2, 107 S. Broadway, Los Angeles, California 90012
   Sacramento—2415 First Avenue, P.O. Box 8074, Sacramento, California 95818
   San Francisco—1407 Market Street, San Francisco, California 94103

A request for a hearing, to be considered, must be received by the State Department of Social Welfare within one year of the postmarked date of the notice of action you are dissatisfied with.

FILE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1969

Office-Supreme Court, U.S.
FILED
SEP 2 1969
JOHN F. DAVIS, C

No. 14

MAE WHEELER, et al.,
Appellants,

vs.

JOHN MONTGOMERY, Director of the STATE DEPARTMENT OF SOCIAL WELFARE, and RONALD BORN, General Manager of the SAN FRANCISCO CITY AND COUNTY DEPARTMENT OF SOCIAL SERVICES,
Appellees.

On Appeal from the United States District Court
for the Northern District of California

Brief for Appellees

THOMAS C. LYNCH
Attorney General of the State of California

RICHARD L. MAYERS
Deputy Attorney General

ELIZABETH PALMER
Deputy Attorney General
6000 State Building
San Francisco, California 94102
Telephone: 557-0266

Attorneys for Appellees

THOMAS M. O'CONNOR
City Attorney City and County of San Francisco

RAYMOND D. WILLIAMSON, JR.
Deputy City Attorney

Of Counsel

...RD PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 14

MAE WHEELER, et al.,
Appellants,

vs.

JOHN MONTGOMERY, Director of the STATE DEPARTMENT OF SOCIAL WELFARE, and RONALD BORN, General Manager of the SAN FRANCISCO CITY AND COUNTY DEPARTMENT OF SOCIAL SERVICES,
Appellees.

On Appeal from the United States District Court for the Northern District of California

Brief for Appellees

QUESTION PRESENTED

Whether recipients of public assistance grants are afforded minimum due process of law in the withholding of a warrant under circumstances and procedures which may be stated as follows:

(1) Where the recipient receives notice immediately upon an initial decision being made of ineligibility and in no event less than three mail delivery days before the usual date of the warrant.

(2) Where the notice or notification specifies and contains the following elements:

(a) The county's proposed action,

(b) the grounds therefor,

(c) information needed or action required of the recipient to determine eligibility,

(d) that the recipient with legal counsel or other person may meet with an agency representative at a specified time or during a specified time period of not exceeding three working days, the last day of which shall be at least one day prior to the usual delivery date of the warrant at which time:

(e) the county's evidence will be fully disclosed,

(f) the recipient shall have the opportunity to produce the information or explanation referred to in (e) above and any other information he desires, and,

(g) the entire matter will be discussed for clarification and, where possible, resolution.

(3) where the warrant may be withheld only when the county's evidence is substantial in nature and reliable in source indicating probable ineligibility.

STATUTES AND REGULATIONS INVOLVED

The present case involves the constitutional, statutory and regulatory provisions set forth in the *single appendix* heretofore filed with this court under Rule 36 (hereinafter referred to as "A").

The case also involves the Department of Health, Education and Welfare (HEW) Handbook of Public Assistance Administration (hereinafter referred to as Federal Handbook) Part IV, sections 2300 (d), (e), (f), and (g) "Criteria for the Administration of the Plans" and section 6400 "Interpretation" which are set forth in Appendix I to the instant brief pages 1 through 5 (the Appendices infra will be referred to as "App.")

The present case also involves California Welfare and Institutions Code sections 12200-12202 set forth in Appendix II page 6, infra.

Also involved herein are the following: the California State Department of Social Welfare Public Social Services Manual (hereinafter referred to as PSS) section 44-325 "Changes in Amount of Payment"; section 40-155 "Principles and Methods of Investigation"; section 40-181 "Continuing Activities and Investigation"; section 48-001 "County Department Responsibility for Case Records"; section 48-013 "Inspection of Records by Applicant or Recipient"; which are set forth in Appendix III infra, pp. 7-20.

Further to be considered is the California State Department of Social Welfare Operations Manual section 22-109 "Request for Review and Fair Hearing: County Department Responsibility"; section 22-113 "State Department of Social Welfare Responsibility"; and recommended procedures set forth in section 22-200 "Client Complaints and Fair Hearings in Public Social Services"; section 22-203 "Concepts and Considerations"; section 22-203.4 "Written Confirmation of County Welfare Department Action"; section 22-205 "Establishment of Complaints and Appeals Unit" which are set forth in Appendix III infra pp. 20-26.

STATEMENT

Appellant, Mrs. Wheeler, as of August 30, 1967, received monthly Old Age Security (OAS) benefits in the amount of $113.95 and Social Security benefits of $44.60 per month. (A.56) On August 30, 1967, the San Francisco City and County Department of Social Services received information that Mrs. Wheeler had received some $6,000.00 in insurance proceeds and other death benefits upon the death of a son. (A.42) On the same day the county agency ques-

tioned Mrs. Wheeler by telephone about this. She admitted receiving these funds, and informed the county that during April 1967 she had transferred a Veterans Administration check for $4,528.15 to her grandson, nephew of the deceased son in accordance with the request of her deceased son (A.56). Although Mrs. Wheeler during this five-month period on several occasions had been in touch with her social worker, she did not report receipt of any of these funds (as required by Cal Welf & Inst Code § 12203) (A.42).

The county withheld Mrs. Wheeler's September 1, 1967 welfare check pending completion of its investigation. (A.56)[1]

On November 7, 1967 the county agency concluded that the transfer was made to avoid discontinuance of welfare benefits and determined that Mrs. Wheeler's action rendered her ineligible for continued benefits.[2] (A. 42)

During the months of September and October and until about November 10, 1967, Mrs. Wheeler lived on her "allowable reserve" and Social Security payments (A. 17).[3] The "allowable reserve" for OAS may not exceed $1200.00 cash.[4]

About November 25, 1967 she received an emergency food order from the county for $15.60, presumably as a result of having notified the county that her reserve funds were exhausted. (A. 18) With no cash assets she was considered

---

1. PSS 44-325.423 effective April 1, 1968 prohibits such precipitous county suspension.

2. Cal. Wel. & Inst. Code § 12050(e).

3. The allegation that for nearly three months appellant subsisted *solely* on her $44.60 monthly Social Security check does not conform to the facts (A.B. 6).

4. Cal. Welf. & Inst. Code § 11154.

eligible for County General Assistance as of December 1, 1967 in the sum of $53.90 (A. 57)[5]

Appellant's request for a fair hearing was filed November 21, 1967 (A. 41).[6] The hearing was originally scheduled for December 15, 1967. It was postponed at Mrs. Wheeler's request and came on for hearing on December 22, 1967. (A. 39-40). The referee's decision was adopted by the Director of the State Department of Social Welfare on January 12, 1968 (A. 57). The decision ordering Mrs. Wheeler restored to OAS effective September 1, 1967 (A. 57) was rendered within 52 days of her request for the hearing. The HEW regulation (Hand Book of Public Assistance Administration section 6200(j)) not effective until July 1, 1968, requires the hearing and decision to be made within 60 days of the request for a hearing (A. 65).

Old Age Security payments were restored by virtue of a temporary restraining order issued by the court below on December 1967. The district court judge entered a class action order concluding that the prerequisites of Federal Rules of Civil Procedure 23(b) (2) were met. The court, finding that the provisions of 42 USC section 2281 were satisfied, ordered the convening of a three judge court. Appellee John Montgomery, Director of the California

---

5. The San Francisco General Assistance program, financed solely by the county, not only includes the cost of living expenses in accordance with the general assistance standards but includes as well such special needs as special diet allowances and necessary medical care. (Declaration of Ronald H. Born, December 1, 1967 Docket Entries 7-8 A. 1) Mrs. Wheeler was receiving medical care at Hahnemann Hospital in late November 1967 when she executed her Affidavit in Support of Motion for Temporary Restraining Order (A. 18).

6. Mrs. Wheeler could have requested a fair hearing immediately upon being notified that her welfare check was being withheld. Cal. Welf. & Inst. Code § 10950. Operations Manual Section 22.021 requires "Written Notice of the right to a fair hearing shall be included in every Notification . . . of the . . . suspension of aid . . ."

State Department of Social Welfare then promulgated Regulation PSS 44-325.43. The court below found that the regulation comports with the due process clause of the Fourteenth Amendment to the United States Constitution and dismissed the action. (A. 65).

SUMMARY OF ARGUMENT

The essence of Appellants attack upon the decision of the court below is contained in Appellants Jurisdictional Statement, page 16, heading VI:

> "VI. The informal conference prior to termination and the HEW fair hearing after termination do not combine to meet due process of law.
>
> "The lower court opinion was based upon a feeling that a combination of the informal conference prior to termination and the fair hearing after termination would jointly create due process of law."

However, Appellants are unable to cite authority directly in point with their above contention but rather rely on cases which state broad constitutional principles.

Conversely, the correctness of the decision of the court below and the constitutionality of the notice and hearing provisions herein involved must be measured in light of the fact that: (1) determinations as to continued eligibility must be made promptly and no less often than once a month with respect to over one and one-quarter million public assistance recipients, and (2) the State of California provides recipients with the fair hearing process called for and required by both the Social Security Act and the provisions of state law (Welfare & Institutions Code §§ 10950-10965); the latter providing for judicial review.

With approximately 1,276,000 recipients of the various categorical aid programs in California, County welfare

departments must make an enormous number of decisions daily respecting continued eligibility—and thus must develop a rapid method of fairly determining whether to suspend, terminate or withdraw public assistance grants for all recipients. The number of determinations required and the need for an expeditious and fair review of these determinations are essential factors in assessing the constitutional adequacy of the regulation and procedures upheld by the court below.

ARGUMENT

I. The California Suspension and Termination of Aid Procedures Fully Comport with Due Process Requirements

INTRODUCTION

The State of California does not dispute the right of welfare recipients to some hearing prior to suspension or termination of aid. This is precisely the claim originally pressed by appellants (A. 63). After this action was instituted and the temporary restraining order issued, appellee John Montgomery, Director of the California State Department of Social Welfare, adopted new regulations to implement existing procedures to assure that pre-withholding of aid procedures would meet due process requirements. At no time however, has appellee conceded that there is a constitutional entitlement to welfare benefits with the concomitant entitlement to the protections required for First Amendment rights.

Due process is a flexible concept dependent on the particular circumstances.

> "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.' '*Cafeteria & Restaurant Workers Union etc. v. McElroy,* 367 U.S. 886, 895 (1961) "[D]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. . . .' *Joint Anti-Fascist Comm. v. McGrath,* 341 U.S. 123, 162-163 (1951) (concurring opinion)."

The pre-withholding investigation and post conference procedures discussed below, as well as the pre-withholding conference, demonstrate that these combined procedures accord aid recipients all of the due process that is constitutionally required.

A. AN INVESTIGATION CONDUCTED WITH THE CONSENT OF THE RECIPIENT PRECEDES NOTICE OF INITIAL DECISION TO WITHHOLD A WARRANT

The notice given a recipient, pursuant to PSS 44-325.43, of the county's initial decision to withhold a warrant, does not come as a bolt from the blue. Eligibility is reconsidered and redetermined periodically and whenever the situation requires it. (Federal Handbook Part IV, 2300(d) App. 1 p. 1.) Reinvestigation entails a personal interview with the recipient.[7] (PSS 40-181.3.)

HEW has made explicit that "in the process of determining initial and continuing eligibility: . . .

> (2) The agency takes no steps in the exploration of eligibility to which the applicant or recipient does not agree; it obtains specific consent for outside contact (whether with social agencies, doctors, hospitals, and similar resources, or with relatives or other individuals); the consent covers the purpose of the contact as well as the individual or agency to be consulted; and where collateral sources are contacted, a clear interpretation is furnished of what information is desired, why it is needed, and how it will be used. If other procedures are followed in an exceptional situation, they are consistent with IV-2200(a) and IV-2300(a), and the case record specifies the reasons why

7. In *McCullough v. Terzian*, now pending in the Court of Appeal, State of California, First Appellate District, 1 Civil No. 25830 and dealing with this same issue, Mrs. McCullough, prior to being interviewed by a county investigator, was advised that she had a right to have counsel present at the interview. At the interview the evidence regarding ineligibility was discussed with her. (CT 64-71)

they were needed and the specific procedures followed." (Federal Hand Book Part IV 2300(e)(2).)

State regulations are to the same effect, (PSS 40-155.24, App. III, p. 12; PSS 40-181.31, p. 14). Information secured shall be evaluated qualitatively rather than quantitively and in light of its internal consistency (PSS 40-155.1, App. II, p. 10). Only when the evidence "is both substantial in nature and reliable in source" indicating probable ineligibility of recipient is the notice given under PSS 44-325.43 (PSS 44-325.421 App. III, p. 7).

The initial decision regarding probable inelligibility must be based on adequately substantiated facts, not rumor, gossip or surmise.

1. THE REGULATION PROVIDES FOR ADEQUATE AND TIMELY NOTICE

PSS 44-325.43 provides that the recipient shall be notified of the county's initial decision to withhold welfare benefits and the grounds therefor at least "three (3) mail delivery days prior to the usual delivery date of the warrant." The notice must state in addition to the grounds for the proposed action "what information, if any, is needed or action is required to re-establish eligibility or to determine a correct grant." Also, the regulation requires a home call by appropriate personnel if the county has reason to believe that the notice may not be delivered or the recipient will not understand it. This clearly meets the due process requirement that there be ". . . notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 314; *Schroeder v. City of New York*, 371 U.S. 208, 211.

These regulations require a recipient to be more fully informed of the grounds for the county's proposed action

than the California Administrative Procedure Act[8] requires for the initiation of full scale ajudicatory proceedings against the holder of a business or professional license, *e.g.*, doctor, pharmacist, barber, pest control operator, etc. Government Code section 11503 provides in relevant part:

> "A hearing to determine whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned shall be initiated by filing an accusation. The accusation shall be a written statement of charges which shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged, to the end that the respondent will be able to prepare his defense. It shall specify the statutes and rules which the respondent is alleged to have violated, but shall not consist merely of charges phrased in the language of such statutes and rules ..."

California provides that the welfare case record shall be open to inspection by the recipient and his authorized representatives at all times. (PSS 48-013, App. III p. 20.) Eligibility investigation reports including "the pertinent information obtained during the investigation, and the sources from which relevant data was secured," are part of the case record. (PSS 48-001.11, App. III pp. 17-18.) (See also Cal Welf & Inst Code § 10850.1)

This is not true for the holder of a business or professional license. Only after the accusation is filed does the licensee have limited right of discovery. (Calif. Gov. Code § 11507.6.) Thus, there is no relevant comparison between a minimum of three mail delivery days' notice for a welfare recipient to answer and the twenty-five days for answer under the California Administrative Procedure Act. (Gov. Code §§ 11505(b) and 11509.[9])

Notice of charges of student misconduct received two days before the disciplinary hearing, was held to be ade-

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8. California Government Code §§ 11500-11528.

9. Amicus curiae brief App. B, p. 13.

quate and timely by the court in *Jones* v. *State Board of Education of and for State of Tenn.*, 279 F.Supp. 190, 199 (M.D.Tenn. 1968). The court in *Jones* pointed out that in *Due* v. *Flordia A.&M. University*, 233 F.Supp. 396 (N.D.Fla. 1963) "a letter was read to the students for the first time at the hearing against them. This was the only notice of the charge that the plaintiffs were afforded, yet the court held the notice to be both adequate and timely."

Appellants allege that the conference is not scheduled for a particular time or with a particular person and the recipient is not advised of her right to appear. (Appellants' Brief p. 11.) Appellants disregard the specific requirements of PSS 44-325.434 that the recipient be informed that he "may have an opportunity to meet with his case worker, an eligibility worker, or another responsible person in the county department, *at a specified time or during a given time period . . . at a place specifically designated. . . .*" (Emphasis added.)

The "Notice of Action" (Appellants' Appendix V pp. 21-22) is only one piece of the information required by the regulation. If the only information received by a recipient was the notice of action as alleged by appellants,[10] there has been a clear violation of the regulation. The notice form, if used, must be accompanied by a letter or otherwise include the information regarding:

(1) The right to, and time and place for a conference;
(2) the grounds for the proposed action;
(3) what information is needed from the recipient;
(4) his right to be represented at the conference.[11]

10. Appellants' Brief p. 18.
11. Operations Manual 22-203.4 App. III, p. 22.

In addition, the recipient is advised that the evidence regarding ineligibility will be fully discussed with him and his representative. Further, this information is available at any time by inspecting the case record.

Prompt resolution of questioned eligibility is clearly to the recipient's advantage. In California eligibility for an OAS grant is not dependent on indigency.[12] If aid is required to be paid pending a fair hearing and the recipient is found ineligible the county may obtain restitution.[13] This may entail exhaustion of reserve funds, sale of home property and other assets to the same extent as any other judgment debtor.

A quick and simple procedure is to the advantage of the county and state as well as the recipient in obviating the time consuming process of the fair hearing. Moreover, "Protection of the fisc" has not been rejected by the appellees.[14] The statement "cost to the state has not been put in issue" was largely based on the incompleteness of the statistics on such costs stemming from the *McCullough* peremptory writ. The California Court of Appeal commented that the proferred "evidence" did not purport to be accurate.

C. THE PRE-WITHHOLDING OF AID CONFERENCE, DESIGNED TO AFFORD RECIPIENTS PROMPT RESOLUTION OF ELIGIBILITY QUESTIONS, MEETS DUE PROCESS REQUIREMENTS

The pre-withholding of aid conference conforms to HEW's requirement for:

> "Effective complaint and adjustment procedures, whereby corrective action may be easily requested and readily taken without the need for a [fair] hearing,

12. See *San Bernardino County v. Simmons*, 46 Cal. 2d 394, 400, 296 Pac. 2d 329, (1956).

13. Cal. Welf. & Inst. Code §§ 12203, 12205.

14. Appellants' Br. pp. 16 n. 17, 17.

are necessary, when indicated. Advance opportunity afforded the recipient to respond to questions which could result in change of grant or termination is a significant part of such procedures. So is written, and whenever practical, oral information of the reasons for change, denial, or termination. This is particularly important where the agency decision is based on judgmental factors or eligibility requirements that entail evaluative decisions on the part of workers, as compared to decisions based on non-debatable facts (such as receipt of OASI, death, etc.). However, the State and local agency adjustment procedures cannot be allowed to interfere with the hearing process."[15]

1. Confrontation and cross-examination are not essential to "due process" at the time of and under the circumstances of these proceedings

Appellants assert that the regulation is constitutionally deficient in that it fails to afford the recipient the right "to confront and cross-examine". This alleged defect is without merit. The court in *Dixon* v. *Alabama State Board of Education,* 294 F.2d, 150, 159 (5th Cir.) expressly rejected the right to cross-examine witnesses. Nor was such condition considered essential in *Knight* v. *State Board of Education,* (M.D. Tenn.) 200 F. Supp. 174, 178 (1961). In *Knight* the court concluded that "the rudiments of fair play and the requirements of due process vested in the plaintiffs [suspended students] the right to be forewarned or advised of the charges to be made against them and to be afforded an opportunity to present their side of the case."

Nonetheless the *Dixon* and *Knight* decisions are cited by Appellants as creating a due process requirement for a "full trial-type hearing" for students at state schools.[16]

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15. Federal Handbook Part IV, 6400(a), App. I, p. 4. See also section 2300(d)(5), App. I, p. 1.

16. Comment, "Withdrawal of Public Welfare: The Right to a Prior Hearing," 76 Yale L.J. 1234, 1239 (1967).

2. Due process does not require an impartial decision maker for an administrative proceeding such as this one

Even in a full-scale trial type administrative proceeding the combination of ajudicating function with prosecuting or investigating functions will not ordinarily constitute a denial of due process. *Marcello* v. *Bonds,* 349 U.S. 302, 311 (1955); *Federal Trade Comm'n.* v. *Cement Institute,* 333 U.S. 683, 700-703 (1948), *Pangburn* v. *C.A.B.,* 311 F.2d 349, 356 (1st Cir. 1962); *Holt* v. *Raleigh City Board of Education,* 265 F.2d 95, 98 (2d Cir. 1959) *cert. den.* 361 U.S. 818. 2 Davis, Administrative Law Treatise (1958) p. 175 et seq.

In California an administrative agency need not use the the services of an impartial hearing officer unless required by statute to do so. This is so even though the board makes the initial decision to terminate employment and conducted its own investigation. *Griggs* v. *Board of Trustees,* 61 Cal. 2d 93, 97-98, 37 Cal. Rptr. 194, 389 P.2d 722, (1964).

However in the interest of reaching an immediate and equitable decision without the necessity of going to a fair hearing appellee Montgomery has recommended to the counties the establishment of a Complaints and Appeals Unit.[17] Many counties have such a unit which is separate and apart from the "line", (i.e., case worker, supervisor,) involved in the initial decision to withhold aid. In the small counties the unit, necessarily, might be composed solely of the director.

3. Appellants other due process attacks on the pre-withholding procedures are not supported by fact or law

Appellants make the unfounded contention that the regulations fail to require a decision based on the evidence at the hearing or that there even be a decision. The regulations require full disclosure of the county's evidence and the recipient has access to the case records plus the opportunity

17. Operations Manual 22-205, App. III, p. 24.

for production of whatever information and evidence he desires to introduce. The county's decision to terminate aid or withhold aid for further investigation must be based on evidence both substantial in nature and reliable in source indicating probable ineligibility. In *Sniadach* v. *Family Finance Corporation,* ..... U.S. ....., 37 U.S. Law Week, 4520 (June 9, 1969) Mr. Justice Harlan concurring stated, "I think that due process is afforded only by the kinds of "notice" and "hearing" which are aimed at establishing the validity, *or at least the probable validity,* of the underlying claim against the alleged debtor before he can be deprived of his property [wages] or its unrestricted use." (Emphasis added.) This is precisely what is required by the regulation. Substantial evidence has been defined by this Court as relevant evidence that a reasonable mind might accept as adequate to support a conclusion, that is, whether a fair and reasonable mind would accept it as probative of the issue.[18]

Appellants decry the lack of a transcript or record of the proceedings. In *Due v. Florida A and M University,* 233 F.Supp. (N.D. Florida) 396, 403 (1963) the court held due process was satisfied in that:

> "There was notice to each of these plaintiffs, the charge was made explicit, and each was afforded full opportunity to be heard, and, in fact, was heard to the point where each said he had nothing more to say.
>
> "A fair reading of the *Dixon* case shows that it is not necessary to due process requirements that a full scale judicial trial be conducted by a university disciplinary committee with qualified attorneys either present or formally waived as in a felonious charge under the criminal law. There need be no stenographic or mechanical recording of the proceedings."

18. *Consolidated Edison Co. v. National Labor Relations Board,* 305 U.S. 197, 229 (1938).

In the instant situation no useful purpose would be served by making such a record since it is clear that the designated next administrative step is the "fair hearing" which is de novo and transcribed, thus being available for court review after administrative remedies have been exhausted.

Appellants' final attack on the regulatory procedure is that the burden of proof is placed on the recipient to prove he is entitled to public assistance; this apparently based on the "initial ex parte decision to terminate aid."[19]

The initial decisions of all administrative agencies whether they be to terminate employment, a driver's license or welfare benefits are ex parte decisions on the part of the agency.[20] The fact that the county agency has made an initial but still tentative ex parte determination that aid should be withheld cannot be interpreted as constituting an effective shift in the formal and legal concept of burden of proof.[21]

D. AVAILABLE POST CONFERENCE PROCEDURES AFFORD RECIPIENTS ADDITIONAL DUE PROCESS

If the decision following the conference is not to the recipient's liking he may request review by the county department staff designated for that purpose.[22] This is of particular importance if the conference has been with the recipient's social worker or direct supervisor. The regulation requires the review staff to promptly reassess the recipient's situation and to take immediate action and effect

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19. Appellants' Brief p. 22.

20. *Griggs v. Board of Trustees*, 61 Cal. 2d 93, 97, 37 Cal. Rptr., 194, 389 P.2d 722 (1964).

21. "This phase of the plaintiffs' argument resolves itself basically into an unfounded argument of semantics brought by the use of the word 'readmit' by the F.A.C." *Jones v. State Board of Education*, 279 F.Supp. 190, 202 (M.D. Tenn. 1968).

22. Operations Manual section 22-109. App. III pp. 20-21.

any adjustment as may be appropriate. The recipient is again informed of his right to a fair hearing. Then if the recipient "has not achieved an understanding with the county" he may request review by the State Department of Social Welfare Complaints Staff who shall reassess and review the situation promptly. The State Staff shall request the county to promptly reassess the problem and may inform the county of the intent or meaning of applicable regulations. The recipient is again informed of his rights to a fair hearing.[23] None of these adjustment procedures, conferences, county and state review can be allowed to interfere with the fair hearing process.[24]

In *Robertson* v. *Bowman,* Civil Action No. 51364 (N.D. Cal. June 21, 1969) the Court order for a full hearing prior to termination of county welfare, does not support appellants' contention that the procedures before this Court are inadequate.[25] The basis for the Court's order in *Robertson* was that the county had no procedures at all prior to actual notice of termination with no provision for a fair hearing following termination. General assistance in California is financed and administered solely by the county under procedures and standards determined solely by each individual county.

As of July 1, 1968, HEW has required that the hearing and decision be made within 60 days from the request for the fair hearing.[26]

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23. Operations Manual sections 22-113. App. III p. 21.

24. Federal Handbook Part IV section 6400(a). App. I p. 4.

25. Appellants' Brief p. 23.

26. Federal Handbook Part IV, section 6200(j). California has not been able to achieve full compliance with the 60-day requirement because of the greatly increased welfare caseload and the number of requests for fair hearing with no comparable increase in the number of hearing referees.

Thus there is provision for a "trial" which is to be held and decided within a limited and defined time following withholding or termination of aid;[27] precluding the defects appellants attribute to the pre-withholding of aid procedures.

II. The Social Security Act Does Not Require Continuation of Welfare Assistance Pending a Fair Hearing

The Social Security Act in plain and simple language requires a state plan to "Provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for assistance under the plan is denied or is not acted upon with reasonable promptness. . . ."[28]

There is nothing in the foregoing that hints, implies, or insinuates that the "fair hearing" must be held before assistance is suspended or denied. The Department of Health, Education and Welfare has not heretofore so interpreted it. The HEW regulation requiring continuation of aid pending the fair hearing decisions was originally issued in proposed form on November 30, 1968, to be effective July 1, 1969, (33 Fed. Reg. at 17853) as the result of a promise made by then Secretary Cohen to the Reverend Ralph Abernathy.[29] There is no evidence that it was the result of intensive analysis and review (Appellants' Brief p. 20). The regulation was finally issued over the vigorous protests of all the States in Volume 34 Fed. Reg. No. 16, p. 1144, January 23, 1969 to be effective October 1, 1969.

27. The *Family Finance Corporation v. Sniadach*, 37 Wis. 2d 163, 154 Northwest 2d 259, 269 dissenting opinion.

28. Appellants' Brief, App. 1.

29. Jurisdictional Statement p. 7.

The delay can be attributed only to these objections and not "to allow those States where no such system existed to adapt to the new procedures."[30]

Every State participates in one or more of the aid programs and every State is required by the Social Security Act to establish, and has established, a fair hearing procedure.

Heretofore and until October 1, 1969, (unless repealed or revised), the HEW regulations authorized termination, suspension or withholding of aid prior to a fair hearing. For example Section 6200 (k) of the Federal Handbook provides, "When the hearing decision is favorable to the claimant, or when the agency decides in favor of the claimant prior to the hearing, *the agency will make the corrected payments retroactively to the date the incorrect action was taken.*" (Emphasis added.)

Section 6300(*g*) reads in part, "Insofar as may be applicable, a decision in favor of the claimant *applies retroactively to the date the incorrect action* was taken, and also applies prospectively." (Emphasis added.)

Section 6500 provides that Federal Financial Participation is available in: "(a) Payments made to carry out hearing decisions, or to take corrective action prior to the hearing, *including corrected payments retroactively to the date the incorrect administrative action was taken.* (b) Payments of assistance continued pending a hearing decision."

We do not accept the apparent contention that HEW has violated the Social Security Act in enacting the above referred to regulations. If Congress had thought so it would have rectified HEW's "erroneous" interpretation during the course of its massive revisions of the Social Security Act effective January 2, 1967. (P.L. 90-248.)

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30. Appellants' Brief p. 26 n. 32.

III. The Hearing Provided by the Regulation Meets the Hearing Requirements of the California Welfare and Institutions Code Authorizing the County to Cancel, Suspend or Revoke Aid "For Cause".

It is contended by amicus curiae Legal Aid Society of Alameda County that certain sections of the Welfare and Institutions Code require a hearing prior to the suspension of aid inasmuch as said section authorizes the county to suspend aid only "for cause." The sections referred to are Welfare and Institutions Code sections 12200 (O.A.S.); 12700 (Blind); 11458 (AFDC); 13750 (Disabled). (Welf. & Inst. Code §§ 12200-12202, App. II, p. 5.) We have no quarrel with this contention with one exception; California Welfare and Institutions Code section 12202 provides: "If at any time the [county] department has reason to believe that aid has been obtained improperly it shall cause an inquiry to be made and *may suspend payment of any installment pending the inquiry.* . . ." (App. II, p. 6) (Emphasis added.)

But more to the point herein, appellants' right to an informal hearing or conference with the county agency under the regulation prior to suspension of aid and the right to a formal hearing before the appellee-director of the State Department of Social Welfare after suspension is precisely the procedure the California Supreme Court found to be required under the Vehicle Code in *Ratliff v. Lampton*, 32 Cal. 2d 226, 231-232 (1948), 195 P. 2d 792. In *Ratliff* the court held that:

> "When read together, these sections may be construed as providing for an investigation and hearing conducted by the department which would afford the licensee an opportunity to *present evidence* under the rule in the *Carroll* and *Steen* cases. If the department determined as a result of such investigation and hearing that good cause existed therefor, it might suspend or revoke, but the order would not become effective

> until 10 days after notice of the action taken. At any time within 60 days after such notice the licensee was entitled to have the action of the department reviewed in a more formal hearing before the director or his representatives, in which the final decision was to be made by the director. *The action of the department in suspending or revoking a license would not be stayed, however, by an application for a hearing,* and the order would become effective at the expiration of the 10-day period notwithstanding the pendency of a review by the director." (Emphasis added; 32 Cal. 2d 226, 231-2)

All that the court required in *Ratliff v. Lampton,* was "a prior opportunity to be heard . . . regardless of whether there is right to administrative review," (32 Cal. 2d at 230) "which would afford the licensee an opportunity to present evidence under the rule in the *Carroll* and *Steen* cases." (i.d. page 231). And what is the rule in these cases? In *Steen v. Board of Civil Service Commissioners,* 26 Cal. 2d 716; 160 p. 2d, 816 (1945) it should be noted the Civil Service employee was already discharged or suspended without any hearing. The Court's concern was not the summary suspension but the hearing before the Civil Service Commission to review that decision; the latter was much the same as the function of the fair hearing under Welfare & Institutions Code sections 10950, et seq. If the department finds for the welfare recipient, the county is directed to re-instate and reimburse the recipient. In *Steen,* the law provided that the county employee may be reinstated by the Civil Service Board following an investigation by the board or the board may make an order sustaining the discharge. The full hearing required under *Steen* was before the Civil Service Commission and followed the employee's suspension by the appointing power, *i.e.,* the Department of Water and Power. To the same effect: See also *LaPrade*

v. Department of Water & Power, 27 Cal. 2d 47 162 p. 2d 13 (1945); *English v. City of Long Beach*, 35 Cal. 2d 155 217 p. 2d 22 (1950).

In *Carroll v. California Horse Racing Board*, 16 Cal. 2d 164 105 p. 2d 110 (1940), concerning the revocation of a horse trainer's license, the court held that since the statute provided that no license may be revoked without just cause the Legislature intended notice and hearing to enable the licensee to appear and answer any charge or complaint lodged against him. The court held that this necessarily requires a fair consideration of any evidence offered by the accused licensee. PSS 44-325.43 requires that recipients receive notice and may have a hearing to answer the charge of ineligibility and that a fair consideration be given to the evidence offered.

Amicus Curiaes' statement (Br. 26) that "Procedures virtually identical to those provided by PSS 44-325.43 were, as a practical matter, undoubtedly available in *Ratliff* also, since the statute required 10 days notice prior to the revocation of the license" is no where substantiated in the decision. The Department of Motor Vehicles had established no procedures at all and maintained that it could take summary action. Further, the department contended that the 10 days notice of revocation was to give the licensee an opportunity to arrange for his affairs, thus belying any presumption that the department was willing to meet and confer with the licensee. The court required a hearing but held that the department hearing could be less formal than the administrative hearing before the Director of the Department.

Keenan v. *San Francisco Unified School District*, 34 Cal. 2d 708; 214 P.2d 382 (1950) is cited by Amicus Curiae (Br. 26) for the proposition that an informal interview with administrative officers "did not constitute a hearing contemplated by the statutes" hence the "informal conference" provided by the regulation is fatally deficient. The informal

interviews Mrs. Keenan had with administrative officers of the Board of Education which were held not to be the hearing contemplated by the "for cause" provision of the Education Code, did not purport to be a "hearing". These interviews were preliminary to the board's formal action dismissing her. "Mrs. Keenan was not notified of the meeting and was not present. . . . It was stipulated at the trial that she was not afforded a hearing." 34 Cal. 2d at 711. The court concluded "that the cause relied upon by the school authorities must be specified and a hearing afforded the the teacher to meet the charge." *Id.* p. 715.

Subsequently, in *Tucker* v. *San Francisco Unified School District,* 111 Cal. App. 2d 875, 880, 882 245 P.2d 597 (1952) the court (in considering rules adopted by the Board of Education following the *Keenan* decision to implement dismissal "for cause" of probationary teachers) stated that "dismissal for cause only obviously implies a hearing and finding of cause" but then concluded (despite Amicus Curiae's assertions to the contrary), "neither did the *Keenan* case or any of the cases cited therein,[31] *determine what is necessary to meet the requirment of notice and a hearing." Id.* 882. (Emphasis added.)

Finally, *Ratliff* neither specifically nor impliedly rejects the appellee's contention that the hearing required by the "for cause" statute need be no more and could very well be less than procedural due process requires. In *Ratliff* and *Keenan* the court stated that although the Constitution does not require a hearing the Legislature could and had required one in the statutes under consideration. It is for these statutorily imposed hearings that the court used the fundamental due process requirements of notice and op-

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31. *Ratliff v. Lampton,* 32 Cal. 2d 226; 195 P.2d 792 (1948), *Carroll v. California Horse Racing Board,* 16 Cal. 2d 164 (1940); *Covert v. State Board of Equalization,* 29 Cal. 2d 125 173 P.2d 545 (1946).

portunity to be heard. See *Anderson National Bank* v. *Luckett*, 321 U.S. 233, 243, 246-247 (1944). In *Anderson* this Court held that the sufficiency of the notice and hearing is to be determined by considering the purpose of the procedure, its effect on rights asserted and all other circumstances which may render the proceeding appropriate, *id.* p. 246.

Amicus Curiae is in error in stating that six months is permitted before a decision is rendered in a fair hearing under Welfare & Institutions Code sections 10950 et seq. (Br. 27). Effective July 1, 1968, the Department of Health, Education and Welfare, in establishing one of the requirements for state plans provided that the decision must be made within 60 days. Federal Handbook of Public Assistance Administration, Section 6300(j) reads, "Prompt, definitive and final administrative action will be taken within 60 days from the date of the request for a fair hearing." In compliance with HEW's requirement, appellee Montgomery adopted implementing regulations. In order to maintain conformity with federal requirements the Legislature has specifically provided that any statute "shall become inoperative to the extent that it is not in conformity with federal requirements." (Welf. & Inst. Code § 11003.)

Under the regulation the recipient is afforded prior apprisal of the proposed action, the grounds therefor and what information is needed from him. The recipient is informed of the nature and extent of the information upon which the county has based its proposed action. He is entitled to be represented by counsel to present his evidence and an opportunity to meet with a County Welfare Department representative in order to discuss and, if possible, resolve the question of eligibility. The county may withhold aid payments only if it has substantial evidence of probable ineligibility.

Amicus Curiae assert that the recipient is only afforded an "informal conference" thereby implying that such a hearing ipso facto fails to meet the "for cause" requirement. This is simply not true. The Federal HEW Regulation relating to the full scale adjudicatory type fair hearing requires that even this last hearing be an informal one. Section 6400(a) Federal Handbook of Public Assistance Administration provides that the fair hearing "is conducted in an informal rather than formal court type procedure *in order to serve the best interests of the claimant,* however, the hearing is to be subject to the requirements of due process" (Emphasis added).

CONCLUSION

The statutes and regulations involved together with the policies and procedures evolved therefrom fully accord due process of law and any other constitutional safeguards heretofore enunciated in the welfare context. That this is so has been demonstrated by the present brief and by the lack in opposing briefs of any citation of authority dealing directly with the matters which were the subject of decision by the court below.

The Court of Appeal of the State of California, Fir
Appellate District, Division Three, on August 19, 19
issued its decision in *McCullough v. Terzian* (1 Civil
25830) reversing the judgment of the Superior Court a
reaching the same conclusion as the court below that th
challenged procedures are constitutional. Heavy relian
has been placed by appellants on the decision of the low
court in *McCullough,* set out in full in the Jurisdictiona
Statement, Appendix H. We desire to place the *McCullough*
appellate court decision before this Honorable Court an
to this end have added Appendix IV.

For the foregoing reasons, the judgment below should
be affirmed.

Dated: August 28, 1969.

Respectfully submitted,

THOMAS C. LYNCH
Attorney General

RICHARD L. MAYERS
Deputy Attorney General

ELIZABETH PALMER
Deputy Attorney General
6000 State Building
San Francisco, California 94102
Telephone: 557-0266

Counsel for Appellees

THOMAS M. O'CONNOR
City Attorney City and
County of San Francisco

RAYMOND D. WILLIAMSON, JR.
Deputy City Attorney

Of Counsel

(Appendices Follow)

Appendix I

Excerpts from United States Department of Health, Education and Welfare, Handbook of Public Assistance Administration

1. Federal Handbook § 2300 et seq. *Criteria for the Administration of the Plans.* Effective 2-6-68.

2300. (d) Eligibility is reconsidered and redetermined periodically and whenever the situation requires it. Specifically, the agency:

(1) Identifies the conditions of eligibility subject to change.

(2) Takes appropriate timely action when there is information in advance that changes are likely to occur in an individual's situation which may affect his eligibility or the amount of his assistance.

(3) Acts promptly—within the applicable agency time standards — to determine continuing eligibility, when it learns from the recipient or other source (e.g., another person or agency), that the recipient's situation has so changed that his eligibility or the amount of his assistance may be affected.

(4) Redetermines eligibility regularly, within the applicable agency time standards specified in agency policy, at which time all eligibility factors subject to change are reconsidered.

(5) Gives advance notice of questions it has about an individual's eligibility so that a recipient has an opportunity to discuss his situation before receiving formal written notice of reduction in payment or termination of assistance.

(e) In the process of determining initial and continuing eligibility:

(1) The agency, in policy and practice, recognizes the rights and responsibilities of applicants and re-

cipients to be responsible participants in their relationship with that agency; it makes clear to them the kinds and sources of factual information that are acceptable as a basis for establishing eligibility; it uses them as the primary source of information about facts concerning their eligibility.

(2) The agency takes no steps in the exploration of eligibility to which the applicant or recipient does not agree; it obtains specific consent for outside contact (whether with social agencies, doctors, hospitals, and similar resources, or with relatives or other individuals); the consent covers the purpose of the contact as well as the individual or agency to be consulted; and where collateral sources are contacted, a clear interpretation is furnished of what information is desired, why it is needed, and how it will be used. If other procedures are followed in an exceptional situation, they are consistent with IV-2200(a) and IV-2300(a), and the case record specifies the reasons why they were needed and the specific procedures followed.

(3) If the agency does not use a declaration form, in each determination of eligibility the agency has a personal interview with the applicant or recipient, unless this is impractical or would delay case action. If difficulties of transportation or other causes preclude a personal interview, contact is made by telephone or correspondence or with someone who can act responsibly for him, except that, in initial determinations of eligibility, a personal interview with the applicant is made as soon as possible.

(4) If the agency has to assume responsibility for the entire process of determination of eligibility, or for parts of it, because of the individual's inability to participate in establishing his eligibility, the agency takes measures to help him establish his eligibility for assistance, and it adheres to the same principles as would be followed if he were participating, including making discriminating selection of sources to be contacted.

(5) When available information from the applicant or recipient is inconclusive and does not support a decision of eligibility, the agency explains to the individual what questions remain and how he can resolve or help to resolve them, what actions the agency can take to resolve them, and the necessity of resolving the questions if eligibility is to be established or continued. If the individual is unwilling to have the agency seek verifying information, the agency, unable to determine that eligibility exists, denies or terminates assistance. In such instances, the individual is notified in writing of the decision, and that he has the right to request a fair hearing on the decision and a right to reapply at any time.

(6) If a declaration form is used in the determination of eligibility process:

(i) Eligibility conditions for the program, both as to number and content, are simple, easily understood by applicants and recipients, and can be determined objectively.

(ii) Forms are simple, clear, relate primarily to eligibility for a specific program or programs, and meet Federal standards.

(iii) Agency policies and procedures assure that appropriate staff is available to assist individuals who are unable to fill out their own forms or who wish assistance.

(iv) The agency's system to test the validity of the determinations based on declaration forms includes methods to test the validity of a continuous random sample of all positive and negative case actions — initial and redeterminations — and the methods, forms and procedures meet Federal standards and appropriately relate to the federally required quality control.

(f) Individuals are informed of the reason(s) for reduction or termination of assistance by a statement of the specific agency policy which serves as the basis for the action. Such notification is given in writing and orally when necessary for clear understanding. There is the same emphasis on helpfulness by agency staff to individuals in connection with the redetermination of eligibility, reduction or termination of assistance as there is in the application process.

6400. *Interpretation*

(a) *Opportunity for a Fair Hearing*

Fair hearing procedures, including the conduct of the hearing, are designed to assure the right of every claimant to demand and obtain a fair hearing. The claimant's freedom to request a hearing, whenever he believes that proper consideration has not been given to all the circumstances surrounding his claim, is a fundamental right and is not to be limited or interfered with in any way.

Since, under the Federal act and the State plan, every aggrieved claimant is entitled to the opportunity for a hearing, only the claimant may withdraw his request for a hearing and this is to be in the form of a written withdrawal.

Effective complaint and adjustment procedures, whereby corrective action may be easily requested and readily taken without the need for a hearing, are necessary, when indicated. Advance opportunity affored the recipient to respond to questions which could result in change of grant or termination is a significant part of such procedures. So is written, and whenever practical, oral information of the reasons for change, denial, or termination. This is particularly important where the agency decision is based on judgmental factors or eligibility requirements that entail evaluative decisions on the part of workers, as compared to decisions based on non-debatable facts (such as receipt of OASI, death, etc.). However, the State and local agency adjustment procedures cannot be allowed to interfere with the hearing process.

Appendix II

California Welfare and Institutions Code Statutes Governing Termination of Aid

12200. The county may for cause, and upon instructions so to do by the department, shall cancel, suspend, or revoke aid. Upon request of the department, an immediate report of every suspension shall be made to the department stating the reason for the suspension and showing the action of the board of supervisors in approving the suspension.

Eligibility for medical assistance for the aged does not constitute cause for retroactive cancellation, suspension, or revocation of aid.

12201. If the board of supervisors, in accordance with Section 12200, cancels, suspends, or revokes aid, the recipient shall be immediately notified in writing of the county's action, the date thereof, and of the reason therefor and the recipient's right to appeal therefrom.

12202. If, at any time, the department has reason to believe that aid has been obtained improperly, it shall cause special inquiry to be made and may suspend payment of any installment pending the inquiry. It shall notify the board of supervisors of such suspension. If it appears upon inquiry that the aid was obtained improperly, it shall be canceled by the department, but if it appears that aid was obtained properly, the suspended payments shall be payable.

Appendix III

Excerpts from California Regulations for Withholding Welfare Payments

1. California State Department of Social Welfare, Public Social Services Manual:

44-325 CHANGES IN AMOUNT OF PAYMENT

.4 *Withheld Payment*

.41 Withheld Payment—Defined

A withheld payment is one which is held beyond the usual delivery date while information concerning needs, income or basic eligibility is investigated, subject to Section 44-325.43.

.42 Limitations on and Requirements for Withholding of Aid Payment

Subject to the following limitations, aid payments shall be withheld when further investigation is necessary to determine continuing eligibility.

.421 Recipients should have the assurance of regular and continued aid payment without interruption or delay. Accordingly, an aid payment may be withheld beyond the usual delivery date only when evidence which is both substantial in nature and reliable in source is received by the county, indicating:

a. Probable ineligibility of the recipient, or
b. A probable overpayment has occurred or is occurring which can be adjusted only if aid payment is withheld.

.43 *Notification to Recipient When Aid Payment is Withheld*

The recipient, the parent or other person responsible for the child in *AFDC*, shall be notified, in

writing, immediately upon the initial decision being made to withhold a warrant beyond its usual delivery date for any reason other than death, and in no case less than three (3) mail delivery days prior to the usual delivery date of the warrant to the recipient. The county shall give such notice as it has reason to believe will be effective including, if necessary, a home call by appropriate personnel. Form ABCD 239, Notice of Action, or a substitute form, may be used for this purpose. Every notification shall include:

.431 A statement setting forth the proposed action and the grounds therefor, together with what information, if any, is needed or action required to reestablish eligibility or to determine a correct grant.

.432 Assurance that prompt investigation is being made; that the withheld warrant will be delivered as soon as there is eligibility to receive it; and that the evidence or other information which brought about the withholding action will be freely discussed with the recipient, parent, or other person, if he so desires (see Section .434 below).

.433 A statement of whether, if aid is withheld, the recipient will or will not continue to be certified for medical assistance during the month aid is withheld.

.434 A statement that the recipient, parent, or other person may have the opportunity to meet with his caseworker, an eligibility worker, or another responsible person in the county department, at a specified time, or during a given

time period which shall not exceed three (3) working days, and the last day of which shall be at least one (1) day prior to the usual delivery date of the warrant, and at a place specifically designated in order to enable the recipient, parent, or other person:

(a) To learn the nature and extent of the information on which the withholding action is based;

(b) To provide any explanation or information, including, but not limited to that described in the notification pursuant to Section .431 above;

(c) To discuss the entire matter informally for purposes of clarification and, where possible, resolution.

.44 *Investigation and Time Limitations*

.441 Evidence raising doubt concerning eligibility or the correctness of grant is to be evaluated, and any needed investigation initiated and completed promptly, regardless of whether there is basis for withholding an aid payment. Such investigation must be completed and appropriate action with respect to the grant taken, within not more than 30 calendar days after the date on which the information which raised doubt concerning eligibility or the grant was received by the county. (See Section 40-155.2 regarding Methods of Investigation.)

.442 Aid payment for a second month may be withheld when the investigation is completed and

the facts regarding continuing eligibility or correctness of grant are established too late in the 30-day period:

a. To permit any necessary discontinuance of aid prior to the second month unless the aid payment is withheld, or

b. To permit necessary adjustment in the aid payment where eligibility continues but to a lesser amount, and delay in the adjustment for another month would result in overpayment which could not be adjusted.

When aid is withheld for a second month the withheld warrants shall be reissued in the correct amount and delivered to the recipient within a maximum of ten calendar days following the normal due date for the second withheld warrant, or delivered to the recipient and a current cash adjustment obtained from him. (See Section 44-333.12.)

(Effective 4-1-68)

40-155 PRINCIPLES AND METHODS OF INVESTIGATION

.1 *Principles of Investigation*

.11 All information secured in the process of determining eligibility shall be evaluated in light of its internal consistency.

.12 Each piece of evidence shall be evaluated in light of the motives and adequacy of knowledge of the person completing the record or document or making the statement.

.13 Evidence shall be evaluated qualitatively rather than quantitatively.

.14 In *AB* the sworn statements, affidavits or affirmations, of the applicant or recipient shall be presumed to be true except with respect to degree of blindness.

.15 When evidence is conflicting, inconsistent or incomplete, the investigation shall be pursued to the point that the preponderance of evidence supports the decision as to eligibility.

.16 All examination reports made to determine degree of blindness in *AB*, or disability in *ATD* are evaluated by the SDSW.

.2 *Methods of Investigation*

.21 The exploration of facts relating to eligibility of the applicant is a joint responsibility of the applicant and the county. Documents and other forms of information in the applicant's possession or readily available to him are to be considered before the evaluation is extended to other sources. To the extent that such evidence appears to be reasonably reliable, complete, and consistent, it shall be accepted as establishing eligibility.

.22 Other sources of information are to be sought only when the applicant does not have information and other evidence to support his application, or when such information and evidence as he is able to give is contradictory or inconclusive. In such case, the investigation is to be directed toward obtaining the most readily available reliable evidence for determining eligibility and need.

.23 The applicant or recipient shall to the extent he is able, assume responsibility for obtaining such additional information and evidence as is needed in the investigation process. However, when he is unable to assume this responsibility in full or in part, the

county shall take the initiative in obtaining the information and evidence.

.24 All such further investigation, including any necessary contacts with collateral sources, shall be undertaken only with the full knowledge of, and agreement by, the applicant and only following full explanation to the applicant of the information desired, why it is needed, and how it will be used.

When needed in such further investigation, and as evidence of the applicant's consent thereto, a specific consent form, signed by the applicant and, if necessary, by his spouse (by both parents in *AFDC* when this is possible) shall be obtained for each such contact. The consent form should cover the purpose of the specific contact as well as the individual or agency to be consulted. Form 228, Applicant's Authorization for Release of Information, may be used for this purpose. A signed consent form is not required when public records are used.

.25 If the applicant is reluctant or unwilling to help resolve inconsistencies or questions concerning his eligibility or to have the county pursue the investigation on his behalf, his reasons are to be considered carefully with him. Such consideration will help assure mutual understanding of the facts and why further investigation is needed. It also will help prevent the applicant from deciding unnecessarily or unwisely to withdraw his application when he may be eligibile. (Effective 4-1-67)

40-181 CONTINUING ACTIVITIES AND INVESTIGATION

.1 *General County Responsibility*

.11 The county paying aid is responsibile for continuing investigation to insure payment only to eligible re-

cipients in the correct amount, to assist recipients to meet their financial and service needs as fully as possible, and to make maximum use of their resources and capacities. The decision as to the frequency of investigation is based upon consideration of all pertinent circumstances in each case. The reinvestigation shall not interfere with the prompt payment of aid unless there are reasonable grounds to suspect that a change has occurred which may result in ineligibility or in overpayment which could not be adjusted within the adjustment period.
Aid shall not be withheld, suspended, or discontinued without compliance with Sections 44-325.42 and 44-325.43.

In *AB* or *ATD* when disability or blindness is the only eligibility factor that is in question the person shall be considered *medically* eligible until such time as an official notification from the State Department of Social Welfare declaring him ineligible is received by the county.

.12 The county is responsible for continuing investigation to identify promptly service needs of the recipient, including medical assistance, and to provide these services. This includes provision of protective services and initiation of guardianship or conservatorship proceedings as needed. (See Services chapter and Section 40-151.)

(Effective 4/1/68)

.13 Controls shall be set up for each item subject to change to insure that contacts are made at the right time. (See section on County Responsibility for Index and Control Files.)

.2 *Periodic Reinvestigation*

.21 In *AB, ATD, OAS,* a reinvestigation of all circumstances of the recipient subject to change shall be made at least once annually whether or not certain aspects of the recipient's situation have been reinvestigated earlier. The due date shall be set according to any plan which provides for completion of such a reinvestigation not later than 12 months from completion of the initial investigation or of the previous reinvestigation.

.22 In *AFDC,* a reinvestigation shall be made not later than six months from the last investigation except cases designated as *AFDC-U* shall be reinvestigated at least every three months.

.23 The county shall consider as the date of completion of the periodic reinvestigation the date the county worker or the case supervisor or the county welfare director signs the reverse of the completed Reaffirmation of Eligibility, Form 206, or in *AFDC,* Form 201.

.24 If a recipient's circumstances change in such a way that it is necessary to review certain aspects of eligibility before the reinvestigation due date, it is desirable to complete the reinvestigation at that time even though the next annual reinvestigation is not yet due. The next due date is then adjusted accordingly.

.3 *Reinvestigation Methods*

.31 Regulations governing the method of the initial investigation also govern all continuing investigations and the periodic reinvestigations. (See Section 40-155.)

.32 The reinvestigation shall include an interview with the recipient preferably in his own home or in the institution where he is living.

.33 In *AFDC* the reinvestigation shall include an interview with the parent or the person responsible for the child, preferably in the home, within a three-month's period prior to the completion of the reinvestigation. Services are provided and plans revised if indicated.

.34 In *AB, ATD, OAS* the recipient shall complete and sign the Form 206, Recipient's Reaffirmation of Eligibility. If the recipient has a guardian or conservator of his estate, the Form 206 shall be completed by such guardian or conservator. If the recipient is unable to comprehend the significance of his receipt of public assistance, to manage his resources, etc., and/or to enter into the procedure of establishing his continuing eligibility, he is considered incapable of completing the required reaffirmation. In such case, if a guardian or conservator of the estate has not been appointed, the Form 206 may be completed and signed on the recipient's behalf by a relative, a close personal friend, or by a representative of a public agency provided such person has all the necessary knowledge of the recipient's circumstances and is willing to affirm thereto.

.35 The recipient's statements and/or the statements of his guardian or any other person acting for him and completing the affirmation together with information obtained from all other sources, shall be evaluated in the light of facts previously known and in relation to potentials for change in eligibility status or amount of grant.

.36 Inability of the recipient to act in his own behalf in completing the affirmation is evidence of need for an immediate evaluation by the county of his individual circumstances (if such has not already been done), a determination of whether he is in need of protective services and, if so, development of a plan for meeting the need. Responsibility rests with the county to arrange for such protective service when indicated. (See Section 40-151.)

.37 In *AFDC* the parent or person (see Section 40-117) acting in the place of the parent shall complete and sign the affirmation Form CA 201 as his affirmation of continuing eligibility.

(Effective 4/1/67)

DIVISION 48 CASE RECORDS

CHAPTER 48-000 CASE RECORDS—GENERAL

48-001 COUNTY DEPARTMENT RESPONSIBILITY FOR CASE RECORDS

The county is responsible for maintaining a case record for each applicant and recipient which identifies each individual and family, their address and household composition. For *AFDC* the record shall identify each child and his parents, their address and household composition. For *OAS* and *AFDC* responsible relatives shall be identified. The record shall also show:

.1 *Case Records—Eligibility, Grant and Investigation*

.11 Each eligibility factor was determined as provided in the appropriate chapter of the Public Social Services Regulations; the investigation was made in accord with Section 40-155 (Principles and Methods of Investigation); the facts recorded by the applicant or recipient; the pertinent information ob-

tained during the investigation, and the sources from which relevant data was secured.

.12 The original or a copy of all forms completed during the initial and subsequent investigations, and forms relating to any transfer of responsibility for payment of aid between counties, correspondence to and from the county pertinent to the individual's eligibility, his grant and any activities toward meeting economic and social needs. Copies of the Form 239 or the 239A need not be retained provided the date they were mailed is recorded.

.13 The basis for the decision that the individual met, or did not meet, the conditions of eligibility, as well as the basis for holding an application pending eligibility as provided in Section 40-171.1, Application Held Pending Eligibility.

.14 That income and resources were explored and that the amount was computed as specified in the Income Chapter, 41-100 and the Property Chapter, 41-300.

.15 The total needs of the individual or family under the appropriate standard and the basis for the decision that he does or does not meet the conditions under which special needs are allowed and how the money amounts allowed were determined as specified in the Needs Chapter, 44-200. For *AFDC*, the basis for inclusion or exclusion of persons in the Family Budget Unit. For *ATD*, the needs of the individual that cannot be met through the grant.

.16 The computation of the amount of any overpayment, and the amount of repayment due, if any; a copy of any demands for repayment; the facts regarding the determination of the debtor's ability to repay and collection activity as required by Section F-420,

et seq., unless this information is recorded centrally elsewhere.

.17 The county action granting, denying, changing, withholding, canceling or discontinuing aid.

.18 A narrative or text containing relevant data (including dates) secured during client or collateral contacts which does not appear elsewhere in the case record (or which is necessary to augment or reconcile data or information recorded in forms or correspondence); entries to reflect the client's reaction to or understanding of the county's interpretation of his rights and responsibilities; the name of the person responsible for each entry in the text and the date of entry.

.2 *Case Records—Intraprogram Status Change*

.21 A record of any intraprogram status change as provided in Regulation 40-183, Intraprogram Status Change, and the basis, therefore, as well as the basis for the determination of the program (*AB* or *APSB*) which is more appropriate for the applicant/recipient. (See Secs. 45-029, Carrying Out the Adult Service Plan, and 40-125.6, Selection of Appropriate Program for Blind Applicants.)

.3 *Case Records—Care in a Medical Institution*

.31 For the recipient 65 years of age or over who is a patient in a public or general medical institution, or in *ATD*, a public or private general medical institution as a result of a diagnosis of mental illness or tuberculosis. (See Secs. 42-605.2, Public Medical Institution, and 42-611.3, Patient in a General Medical Institution-Diagnosis of Tuberculosis or Psychosis.)

.311 The date of the recipient's admission to the medical institution.

.312 The estimated period of care in the medical institution.

.32 For a recipient who is a patient in a public or private hospital or nursing home:

.321 A statement of whether the medical facility is certified under the Medi-Cal Program as a hospital or a nursing or convalescent home.

.322 The date of the patient's admission to the medical facility, the dates of any absences from the facility, and the date of discharge.

.323 If the medical facility is a state hospital for the care of the mentally ill or the mentally retarded, pertinent information to support the determination of eligibility as provided in Department Bulletin No. 650.

.4 *Case Records—Certification for Medi-Cal*

A record of the certification and each recertification of the recipient for medical care under the Medi-Cal Program.

.5 *Case Records—Services*

.51 That the service needs of the recipient were explored, a social study completed, when appropriate; the plan developed for meeting identified needs and progress of the service plan as required by the Services Chapter. Except for *OAS*, this includes the individual's plan for self-support.

.52 That referrals required in the Services Chapter were made. In *AFDC* notification or referral was made to the district attorney or notification to the

court when required under Sections 42-527, Referral and Notification to District Attorney, and 42-529.1, Notification to the Court.

.53 County efforts to assist the family toward self-maintenance and family efforts to achieve self-maintenance. (See Services Chapter.)

48-013 INSPECTION OF RECORDS BY APPLICANT OR RECIPIENT

The applicant, recipient or his attorney or authorized representative (attorney or agent) may inspect the case records including the entire case narrative relating to the applicant or recipient which are filed in the SDSW or the county with the following exceptions:

.1 *Privileged Communications*

Portions of the record which qualify as "privileged communications" as defined in Sections 954 (lawyer-client), 980 (marital communications), 1040 (official information), and 1041 (identity of informer) of the Evidence

(Effective 3/1/68)

2. California State Department of Social Welfare, Operations Manual

22-109 REQUEST FOR REVIEW AND FAIR HEARING:

COUNTY DEPARTMENT RESPONSIBILITY

.1 *Availability of Review*

In all individual relationships the county shall strive for prompt, simple and precise explanations of its actions to assure the maximum understanding on the part of the individuals. If this is not achieved between the individual and the social worker, the county shall be responsible for providing administratively a process through which

the individual will receive an appropriate explanation or a resolution of his problem. (See Regulations Sections 40-131.41 and 44-325.434.)

.2 *Designation of Staff to Conduct Review*

.21 The county department, in accordance with its size and/or administrative structure, shall specifically designate staff to be responsible for the activities connected with requests for review. Such staff shall be in a position to reassess promptly the client's situation in the light of applicable regulations with freedom to consider alternatives other than confirmation of the action under review.

.22 The county department's designated staff shall have authority to take immediate action and effect any adjustment as may be appropriate. In the review special attention should be given to discover and correct:

.221 Failures of communication between complainant and worker.

.222 Erroneous application of public social service or food-stamp regulations.

.223 Failure to provide aid and services promptly and humanely, without discrimination, and in a manner as to encourage self-respect and self-reliance.

.3 *Dissatisfaction with Review*

As part of the review process, the client shall again be informed by county staff of his right to a fair hearing.

22-113 STATE DEPARTMENT OF SOCIAL WELFARE RESPONSIBILITY

.1 The State Department of Social Welfare is responsible for providing a process whereby the individual who has

not achieved an understanding with the county may have his situation reassessed and reviewed promptly.

.2 The State Department of Social Welfare complaints Staff shall receive the request for review, contact the designated staff in the appropriate county, inform the county of the client's problem, and request that the problem be promptly reassessed. The State Department of Social Welfare staff may inform the county of the intent or meaning of applicable regulations. As part of the review process the client shall be informed of his right to a fair hearing. (Effective 7/1/68)

22-200 CIENT COMPLAINTS AND FAIR HEARINGS IN PUBLIC SOCIAL SERVICES

22-203 CONCEPTS AND CONSIDERATIONS

.4 *Written Confirmations of County Welfare Department Actions* (40-173, 40-107.3 and 21-021)

County welfare departments inform their clients of their actions through interviews followed by written confirmation on the ABCD 239, Notice of Action. The ABCD 239 often bears no more than two or three sentences or a coded phrase to indicate the basis for denial, withholding or discontinuing. Good practice demands that whenever elements of an interview are confirmed in writing, that the confirmation should reflect all significant elements of that interview. Action notices so brief that they omit confirmation of understanding achieved through discussion, tend to distort rather than clarify. In most cases, therefore, it will be advisable to accompany the ABCD 239 with a letter.

There are advantages in using a comprehensive confirming letter discussing the basis of the department's actions

in the event of denial or other major change in aid status. Use of such letters results in:

(1) Better focused and structured interviews by staff who wrote the confirming letter.
(2) Discovery of additional possibilities for adjustment or the better use of other resources.
(3) Improvement in relations with community organizations and advocacy resources when such letters were available as documentary evidence.
(4) Great assistance in preparation of bases of action, should a request for fair hearing be filed.

Notice of Action letters should include at least these elements:

(1) The reasons for the action in light of the rules and of the facts as understood by the county, all stated in understandable terms.
(2) Responses to questions raised by the client.
(3) Recognition of problems or unmet needs.
(4) Referrals to resources.
(5) Right of fair hearing and referral to legal resources, when available, for help in preparing for the hearing.
(6) Statement of what information, if any, may be needed. (When appropriate.)

.5 *Complaints* (22-101)

Many situations arise that bear the label "complaint." However, for the fair hearing process, only that situation which can be designated "client complaint" has much meaning. The term "client complaint" does not apply when the client is addressing an issue(s) to the social work unit. As long as the client's concern is directed to the unit, the situation is still fluid and subject

to normal casework resolution. If the issue is not resolved to the client's satisfaction, it may then become a "client complaint" or a request for fair hearing. Indication of client dissatisfaction addressed to administrative staff or referred to the county welfare department from SDSW, the Governor, legislators, boards of supervisors, other "VIPs" or the client himself are considered "client complaints."

Landlord complaints or neighbors reporting what they consider to be client misconduct, individuals or groups taking issue with welfare policies or procedures, or negative reactions toward welfare recipients in general are more closely related to public relations operations than to fair hearings. Such public complaints require immediate attention by the county welfare department. Procedures for handling this type of complaint have been developed by county welfare departments. However, information about client behavior from neighbors or other interested parties, hostile or other, may be relevant to the helping process or to eligibility determination, and should also be forwarded systematically to the responsible social work unit.

22-205 ESTABLISHMENT OF A COMPLAINTS AND APPEALS UNIT (COORDINATOR/SPECIALIST)

Increase in the volume of issues arising between the welfare system and its clients has led many counties to combine client complaint and fair hearing responsibilities and assign them to one position or to an administrative unit. This provides the county with a systematic and uniform approach to resolving issues. The size of the county determines whether this unit shall be composed of one or more persons, or an individual who devotes part time to

complaints and appeals. If the unit is an individual, full or part time, he might be designated "C&A Coordinator or Specialist." In a small county this person might be the director, assistant director, or program supervisor. The unit functions as the director's representative in complaint and appeal matters. Assignment of this function should be made in terms of the best way it can be integrated into existing organizational structure and procedures.

The material which follows sets forth functions and tasks which make a logical group of related responsibilities.

.1 *Role and Authority*

A complaints and appeals unit specializes in handling "client complaints" and fair hearings. Their basic responsibility is to enhance the issue resolving process. Complaints and Appeals specialists have a thorough knowledge of statutes and SDSW fair hearing regulations, as well as program regulations. They are familiar with county administrative procedures and the goals and objectives of all programs. Complaints and Appeals specialists have the authority to take immediate action and effect any adjustment as may be appropriate at every stage in issue resolution. (22-023, 22-109.2)

The specialist has several roles.

.11 His broad knowledge of program enables him to furnish consultation before a "client complaint" has become a request for fair hearing. He may modify or reverse the line decision, within the scope and intent of the regulations and statutes. Such action could settle the issue, thereby resolving the complaint and eliminating a possible fair hearing request.

.12 The same approach applies following request for fair hearing, with the emphasis on reaching an

equitable solution without the necessity of going to hearing.

.13 Where no such avenues can be found, he helps prepare a clear and fair presentation of the issue(s) at the fair hearing. He is not limited to presenting "the county's case." His role is to help all parties present all relevant facts with a view toward effecting the most equitable possible decision.

.14 He keeps appropriate administrative staff aware of implications arising out of complaint and fair hearing activity.

.2 *Specific Tasks and Functions of the Complaint and Appeal Unit*

.21 *Basic Objectives*

The responsibility of a CWD is to assure that all possibilities of adjustment are explored and all resources, within and outside the welfare system, are mobilized to meet the client's need. The Complaints and Appeals unit sees to it that special procedures, i.e., case record removal occasioned by preparation for the hearing, do not cause an interruption in service, delay in aid payments, or delay in meeting any other needs the client may have while all possibilities of adjustment are explored.

(Issued 3/1/69)

Appendix IV

In the Court of Appeal of the State of California
First Appellate District, Division Three

1 Civil No. 25830

Filed Aug. 19, 1969,
Court of Appeal—First App. Dist.
Lawrence R. Elkington, Clerk

Mary McCullough, Melvin McCullough, Michael Johnson and Rosaline Johnson, by their Guardian Ad Litem Mary McCullough,

Plaintiffs and Respondents,

vs.

Hrayr Terzian, Director of the Alameda County Welfare Department, John Montgomery, Director of the Department of Social Welfare of the State of California,

Defendants and Appellants.

OPINION

On April 19, 1968, respondents filed in the Superior Court in Alameda County a petition for writ of mandate and a complaint for declaratory relief on their own behalf and on behalf of all persons in the State of California receiving Aid to Families with Dependent Children benefits.[1] Both causes of action were based on the contention that express provisions of the Welfare and Institutions Code and the due process clauses of the California and United States Constitutions require an adequate hearing prior to the withholding or termination of AFDC benefits.

1. For editorial purposes, Aid to Families with Dependent Children will hereafter be described as AFDC.

On the date the action was filed, an alternative writ of mandate was issued directing appellants John Montgomery, Director of the State Department of Social Welfare, and Hrayr Terzian, Director of the Alameda County Welfare Department, to release forthwith the warrant due the named petitioners on April 1, 1968 and all other warrants due them thereafter under the AFDC program or show cause why they should not do so. On April 25, 1968, the return date on the alternative writ, appellants appeared and filed a responsive pleading. It was stipulated that the class of persons represented by the named petitioners consisted of recipients of public assistance under the Aid to Blind, Aid to Needy Disabled, Old Age Security, and AFDC programs, the so-called "categorical aid" programs, rather than under the AFDC program only.

The court found that appellants had substantially complied with the provisions of section 44-325.43 of the State Department of Social Services Manual (hereinafter referred to as PSS 44-325.43[2] in terminating the named peti-

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2. "The recipient, the parent or other person responsible for the child in *AFDC*, shall be notified, in writing, immediately upon the initial decision being made to withhold a warrant beyond its usual delivery date for any reason other than death, and in no case less than three (3) mail delivery days prior to the usual delivery date of the warrant to the recipient. The county shall give such notice as it has reason to believe will be effective including, if necessary, a home call by appropriate personnel. Form ABCD 239, Notice of Action, or a substitute form, may be used for this purpose. Every notification shall include:

.431 A statement setting forth the proposed action and the grounds therefor, together with what information, if any, is needed or action required to reestablish eligibility or to determine a correct grant.

.432 Assurance that prompt investigation is being made; that the withheld warrant will be delivered as soon as there is eligibility to receive it; and that the evidence or other information which brought about the withholding action will be freely discussed with the recipient, parent, or other person, if he so desires (see Section .434 below).

(Continued on following page)

tioners' public assistance benefits; that the petitioners were caused irreparable injury by the withdrawal of said benefits; and that the class of persons receiving public assistance benefits under the categorical aid programs was adequately represented by the named petitioners. The court concluded that the procedures established by PSS 44-325.43 and followed by appellants failed to provide the hearing required by law.

The judgment declared invalid the regulation contained in PSS 44-325.43 "because and to the extent that it does not provide a hearing with adequate procedural safeguards" prior to the withholding of categorical aid benefits as required by state law and the United States and California Constitutions. The judgment also ordered the issuance of two peremptory writs of mandate.

It is from this judgment that the appellants appeal. The facts of the case relative to the named respondents need not be stated here as they have since been afforded a "fair hearing" and found eligible for continued aid. Therefore the only issues remaining are those raised by the class action, namely:

.433 A statement of whether, if aid is withheld, the recipient will or will not continue to be certified for medical assistance during the month aid is withheld.

.434 A statement that the recipient, parent, or other person may have the opportunity to meet with his caseworker, an eligibility worker, or another responsible person in the county department, at a specified time, or during a given time period which shall not exceed three (3) working days, and the last day of which shall be at least one (1) day prior to the usual delivery date of the warrant, and at a place specifically designated in order to enable the recipient, parent, or other person:

(a) To learn the nature and extent of the information on which the withholding action is based;

(b) To provide any explanation or information, including, but not limited to that described in the notification pursuant to section .431 above;

(c) To discuss the entire matter informally for purposes of clarification and, where possible, resolution."

I. Does PSS 44-325.43 satisfy the procedural due process requirements of the United States Constitution?

II. Does PSS 44-325.43 satisfy the procedural due process requirements of the California Constitution and the statutory provisions of the California Welfare and Institutions Code?

The regulations in question must be considered in the light of the fact that if aid is terminated or modified the state must grant the recipient a "fair hearing" as provided in Welfare and Institutions Code section 10950, et. seq. and a judicial review as provided in Welfare and Institutions Code section 10962.

I. Does PSS 44-325.43 satisfy the procedural due process requirements of the United States Constitution?

The appellants contend that the regulations in question meet due process requirements of the United States Constitution. The regulations require prior notice specifying the proposed action to be taken, grounds therefor, information needed to determine eligibility, and a subsequent opportunity to be heard and to be represented by counsel, to the end that a fair determination can be made. Full disclosure is to be made by the county of the information upon which the proposed action is based. The notice may be given and aid withheld only if the county has evidence "which is both substantial in nature and reliable in source . . . indicating . . . probable ineligibility. . . ." (PSS 44-325.421.) The recipient or his attorney also has the right to inspect the case file in the state department or any county at any time during business hours. (Welf. & Inst. Code § 11206.) Appellants further contend that the constitutionality of the regulations in question was raised in *Wheeler v. Mont-*

gomery (U.S.D.C., N.D. Calif., Civ. Act. 48303), before a 3-judge court, and that court found the regulations comport with the due process provisions of the United States Constitution. A federal court in New York found a regulation of New York State, in some respects similar to the California regulation, not to be in accord with the United States Constitution. (Goldberg v. Kelly, U.S.D.C., S.N.Y.) The United States Supreme Court has noted probable jurisdiction in both cases.

The respondents contend that the regulations fail to include the necessary elements of due process in that they (1) fail to provide adequate notice; (2) do not provide for confrontation and cross-examination of witnesses; (3) do not require a decision based on evidence produced at the hearing and on the merits; (4) do not provide an impartial trier of fact; and that there is no compelling public necessity for these procedural inadequacies.

Were the requirements of due process specified in the constitution or by statute our task would be simplified. However, such is not the case. As stated by the California Supreme Court in *Sokol v. Public Utilities Commission,* 65 Cal.2d 247, 254: "What is due process depends on circumstances. It varies with the subject matter and the necessities of the situation." In *Cafeteria Workers v. McElroy,* 367 U.S. 886, 894-895, the United States Supreme Court stated: "The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interest. 'For, though "due process of law" generally implies and includes *actor, reus, judex,* regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings, . . . yet, this is not universally true.' [Citation] The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. [Citations] '"[D]ue process," unlike some legal rules, is not a

technical conception with a fixed content unrelated to time, place and circumstances.' It is 'compounded of history, reason, the past course of decisions. . . .'"

Public welfare in the United States is a tremendous undertaking involving millions of recipients. Applications for aid must be processed promptly and with a minimum of delay to the recipient, and modification and termination of benefits must likewise be handled in a prompt manner if the system is to function. These are the circumstances that must be considered in determining the content of due process in this case. In the case of *Escobedo v. State of California,* 35 Cal.2d 870 (see also Orr v. Superior Court, 71 A.C. 233) where the charge was made that the statute violated the due process provisions of the state and federal constitutions in not providing for a hearing before suspension of a driver's license, the court stated that due process was not violated as the procedure was reasonably justified by a compelling public interest considering the substantial number of drivers involved, and to require a hearing in every case before suspension would substantially burden and delay if not defeat the operation of the law. The *Escobedo* and *Orr* cases pertain to the financial responsibility of drivers, as distinguished from those cases dealing with public safety and health.

There being no fixed rule it is necessary, therefore, to test the regulations in the light of respondents' contentions against the requirements of past decisions.

Turning to the respondents' first contention, that the regulations fail to provide adequate notice, Section 44-325.43 provides: "The recipient . . . shall be notified, in writing immediately upon the initial decision being made to withhold a warrant beyond its usual delivery date for any reason other than death, and in no case less than three (3) mail delivery days prior to the usual delivery date of the warrant to the recipient." Neither party has offered any statement

of fact or cited any authorities to show that the period allowed is or is not adequate, and we cannot say as a matter of law that the 3-day notice is inadequate.

The respondents next contend that confrontation and cross-examination of witnesses are essential elements of due process. Respondents cite *Greene v. McElroy*, 360 U.S. 474, 508; *Walker v. City of San Gabriel* (1942) 20 Cal.2d 879, and *Willner v. Committee on Character* (1963) 373 U.S. 96, 103. These cases do not hold that confrontation and cross-examination are essential to due process.

The *Greene* case involved a firing of the petitioner for security reasons. In the petitioner's hearing before the review board he was not permitted confrontation or cross-examination of witnesses. The actual question before the court was whether the President and Congress had delegated the power to the Secretary of Defense to conduct a hearing in this manner. The court found they had not. The court then ruled "We decide only that in the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." The court specifically stated it was not deciding the constitutionality of the question.

In the *Walker* case the only evidence offered the city council in a hearing to revoke a business license was a letter from the chief of police setting forth numerous charges against the licensee. The licensee maintained that until the witnesses were produced and an opportunity given to cross-examine them there was no evidence before the city council. The Supreme Court did not even comment in its opinion on this point but decided the case on the issue of what constitutes substantial evidence.

The *Willner* case at the most holds "that procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood." The concurring opinion points out "this does not mean that in every case confrontation and cross-examination are automatically required. It must be remembered that we are dealing, at least at the initial stage of proceedings, not with a court trial, but with a necessarily much more informal inquiry into an applicant's qualifications for admission to the bar."

On the other hand, the right to confrontation and cross-examination was expressly rejected in *Dixon v. Alabama State Board of Education,* 294 F.2d 150, and was not listed among the requirements of due process in *Knight v. State Board of Education,* 200 F.Supp. 174. (See also Thorpe v. Housing Authority, 386 U.S. 670.)

In view of the above authorities, confrontation and cross-examination of witnesses cannot be held to be an essential element of due process in a pretermination hearing.

Respondents further contend that the failure of the regulations to require a decision by a person having no prior direct involvement in a case renders them inadequate to provide the protection required by due process.

Respondents quote from *Wasson v. Trowbridge,* 382 F.2d 807, 813: "It is too clear to require argument or citation that a fair hearing presupposes an impartial trier of fact and that prior official involvement in a case renders impartiality most difficult to maintain." However, that court did not hold that a person with prior official involvement could not hear the case but only that the petitioner had the right to show that the prior involvement was such that bias could be presumed.

The California Supreme Court in *Griggs v. Board of Trustees,* 61 Cal.2d 93, 97, a case involving the dismissal of a school teacher, stated: "In support of the determination of

the trial court that Mrs. Griggs was deprived of a fair trial, it is asserted that, prior to the hearing, the members of the board took evidence, held discussions with outsiders and expressed opinions concerning the accusation filed by the superintendent. We find nothing improper in the conduct of the members of the board."

In the light of *Griggs* the fact that the person conducting the hearing has had prior involvement in the case does not of itself constitute a violation of due process.

The respondents further contend that the regulations fail to require a decision based on evidence produced at a hearing. The respondents point out that under the challenged regulation, the initial review and evaluation of the county's evidence takes place ex parte before the recipient is even notified of any proposed action.

It is true that the regulations do not specify that the decisions be based on the evidence produced at the hearing; however, numerous cases in California hold that "the requirement of a hearing necessarily contemplates a decision in the light of the evidence introduced." (English v. City of Long Beach, 35 Cal.2d 155; La Prade v. Department of Water & Power, 27 Cal.2d 47; Carroll v. California Horse Racing Bd., 16 Cal.2d 164.) The county is bound by this requirement and it would be an empty act to conduct a hearing if this were not the case. The fact that the initial review and evaluation of the county's evidence takes place ex parte before the recipient is notified of any proposed action is not improper in the light of *Griggs v. Board of Trustees, supra.* In *Griggs* the court stated: "The first step to be taken in the termination procedure is the notification to the teacher that his services will not be required for the ensuing year. It is thus clear that, before there is any occasion for a public hearing, the board must make an ex parte determination that there is good cause for dismissal, and, in order

to be able to make this decision, the board must have some knowledge of the facts." This is essentially the procedure provided for in the regulations.

We conclude that the regulations do comport with the due process clause of the United States Constitution.

II. Does PSS 44-325.43 satisfy the procedural due process requirements of the California Constitution and the statutory provisions of the California Welfare and Institutions Code?

The respondents correctly state the point that in addition to the federal constitutional issues involved here, the State of California may insist upon greater procedural rights for its citizens than those required by the Fourteenth Amendment.

Looking first to the California Constitution, Article I, section 13 provides that no person shall be deprived of life, liberty or property without due process of law. In *Abstract Investment Co. v. Hutchinson,* 204 Cal.App.2d 242, it was held that this provision is "identical in scope and purpose with the Fourteenth Amendment," so, in effect, adds no additional safeguards to those already included in the federal constitution.

Welfare and Institutions Code sections 11458, 12200 and 12700 provide that benefits under the categorical aid programs may be withdrawn "for cause". Both parties in this case agree that "for cause" requires notice and hearing before a withdrawal of benefits.

The case cited by both parties, *Ratliff v. Lampton* (1948) 32 Cal.2d 226, and the cases cited by respondents, *Carroll v. California Horse Racing Bd., supra* (1940) 16 Cal.2d 164; *La Prade v. Department of Water & Power, supra* (1945) 27 Cal.2d 47; *Covert v. State Board of Equalization* (1946) 29 Cal.2d 125, and *Steen v. Board of Civil Service Commrs.* (1945) 26 Cal.2d 716, all stand for the rule that where an

agency is required by statute to act for cause, an affected party must be afforded a hearing prior to action unless there is a clear showing of a contrary legislative intent. However, as the regulations in the present case do provide for a pretermination hearing, these cases are of little help. The appellants assert that the hearing required by the statute need be no more than that required by due process. The respondents maintain that in *Ratliff* the court specifically rejected this contention and that *Ratliff* stands for the proposition that "for cause" in a statute means more than due process in the constitution.

Presuming the correctness of respondents' position that the words "for cause" in the statute require a hearing prior to termination, the respondents have no cause for complaint as the regulations provide the hearing. *Ratliff* did not specify how the hearing was to be conducted, as that was not an issue in the case.

Here the regulations provide a pretermination hearing in compliance with due process, and as such fulfill the requirements of California law.

The appellants state that according to department regulations the county "should reach a decision as soon as possible" following the pretermination hearing. Actually, if the pretermination hearing is to have any meaning the decision must be rendered before aid can be withheld.

The motion to take judicial notice of the regulations submitted by appellants is granted. The motions made pursuant to California Rules of Court 23(b) are denied.

The judgment is reversed.

Caldecott, J.

We concur:

Draper, P. J.

Brown (H.C.), J.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 14

MAE WHEELER, ET AL., APPELLANTS

v.

JOHN MONTGOMERY, DIRECTOR OF THE STATE DEPARTMENT OF SOCIAL WELFARE, AND RONALD BORN, GENERAL MANAGER OF THE SAN FRANCISCO CITY AND COUNTY DEPARTMENT OF SOCIAL SERVICES

No. 62

JACK R. GOLDBERG, COMMISSIONER OF SOCIAL SERVICES OF THE CITY OF NEW YORK, ET AL., APPELLANTS

v.

JOHN KELLY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE NORTHERN DISTRICT OF CALIFORNIA AND THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order of April 21, 1969, inviting the Solicitor Gen-

oral to express the views of the United States with respect to these cases.

OPINIONS BELOW

The opinion of the three-judge district court in No. 14 (Wheeler App. 62[1]) is reported at 296 F. Supp. 138. The opinion of the three-judge district court in No. 62 (Goldberg App. 365a) is reported at 294 F. Supp. 893.

JURISDICTION

In No. 14, the district court's judgment was entered on April 19, 1968, and the notice of appeal was filed on June 14, 1968. In No. 62, the judgment was entered on December 13, 1968, and the notice of appeal was filed on January 6, 1969. In both cases, this Court noted probable jurisdiction on April 21, 1969 (394 U.S. 970–971). The jurisdiction of this Court rests on 28 U.S.C. 1253.

QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment to the Constitution requires the States to afford recipients of welfare assistance a trial-type hearing before suspending, terminating or reducing their benefit payments.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Social Security Act, as amended, 42 U.S.C. 301 *et seq.*, are as follows:

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[1] "Wheeler App." citations are to the appendix in No. 14. "Goldberg App." references are to the appendix in No. 62.

§ 302(a). A State plan for old-age assistance, or for medical assistance for the aged, or for old-age assistance and medical assistance for the aged must—

* * * * *

(4) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for assistance under the plan is denied or is not acted upon with reasonable promptness * * *.

§ 602(a). A State plan for aid and services to needy families with children must * * * (4) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for aid to families with dependent children is denied or is not acted upon with reasonable promptness * * *.[2]

Pertinent excerpts from Part IV of the Handbook of Public Assistance Administration of the United States Department of Health, Education, and Welfare (hereafter "Handbook") are set out in Appendix II to the Brief for Appellants in No. 14. The relevant provisions of the California Welfare and Institutions Code and of California state regulations are set out in Appendices III and IV to the Brief for Appellants in No. 14. The applicable New York state regulation is set out in Appellant's Brief in No. 62, pp. 2–5.

STATEMENT

Rather than attempt its own description of the facts of the pending cases, the government sets forth below

[2] Parallel provisions apply to the programs of aid to the blind, aid to the permanently and totally disabled, aid to the aged, blind, or disabled, and medical assistance. 42 U.S.C. §§ 1202(a)(4), 1352(a)(4), 1382(a)(4), and 1396a(a)(3) (Supp. IV).

only a brief summary of the proceedings below. Like the brief *amicus curiae* which the government filed in No. 62 below, the Statement is principally devoted to an explanation in outline form, based on information supplied by the Department of Health, Education, and Welfare, of certain Federal policies and procedures applicable to the Federal-State programs involved here.

1. WHEELER V. MONTGOMERY

In No. 14, the appellant, Mae Wheeler, brought an action for individual and class declaratory and injunctive relief from California welfare procedures permitting the termination or suspension of assistance—including assistance from Federal-State programs under the Social Security Act—before the giving of notice and an opportunity to be heard in a trial-type proceeding. The State assistance program specifically involved was Old Age Security assistance, which is eligible for federal funding under Title I of the Social Security Act, 42 U.S.C. 301 *et seq.*, subject, *inter alia,* to a requirement that the participating state agencies provide a "fair hearing,"[3] on request, to any claimant to whom assistance is denied. 42 U.S.C. 302(a)(4). Because the complaint sought to enjoin the operation of California statutes and regulations of general application on grounds of conflict with the Fourteenth Amendment, a three-judge dis-

[3] To avoid any confusion between the statutory requirement of a "fair hearing" and a hearing that is fair in the constitutional sense of meeting the requirements of the Due Process Clause, quotation marks are used where the statutory hearing is referred to.

trict court was convened.[4] 28 U.S.C. 2281; Wheeler App. 29–31.

California then amended its Public Social Services Manual to provide for the termination procedures, now in effect, which were ruled on by the district court. These procedures require that whenever a decision is made to withhold welfare assistance from a present recipient, a notice of the proposed action and the reasons for it must be given to him at least three mail-delivery days before the withheld assistance ordinarily would be received. The recipient is then entitled to an informal conference with his caseworker or another responsible person in the county department, before the withdrawal takes effect, to "learn the nature and extent of the information on which the withholding action is based," to "provide any explanation or information" to the officials concerned, and to "discuss the entire matter informally for the purposes of clarification and, where possible, resolution." Brief for Appellants in No. 14, pp. 19a–20a.

The district court concluded that this pre-termination informal conference procedure, taken together with the trial-type "fair hearing" required by statute and regulations to be held soon after termination, met the demands of due process.

[4] In convening the three-judge court, the ruling district judge noted that the pleadings also raised by inference a further constitutional challenge—that if the California termination procedures were not repugnant to the Social Security Act, that Act was repugnant to the Due Process Clause of the Fifth Amendment. Wheeler App. 30.

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2. GOLDBERG V. KELLY

The action in No. 62 was brought by a number of New York State welfare recipients; some of them were recipients of general assistance under state law and the others were recipients of Aid to Families with Dependent Children ("AFDC"), a federally-funded program under Title IV of the Social Security Act, 42 U.S.C. 601 *et seq.* Like Mrs. Wheeler, they sought individual and class declaratory and injunctive relief from the operation of New York statutes and regulations which permitted the termination or suspension of benefits before the giving of notice and an opportunity to be heard in a trial-type proceeding, on grounds of conflict with the Due Process Clause of the Fourteenth Amendment. A three-judge district court was convened. Goldberg App. 131a–139a.

At the time the suit was brought, State regulations provided for neither notice nor hearing before termination of welfare assistance, but permitted recipients under state as well as Federal-State programs to obtain a trial-type hearing after termination. During the pendency of the action, the state regulations were amended—for both State and Federal-State programs—to require local program administrators to choose one of two new procedures: (1) an informal pre-termination hearing procedure similar to that adopted by California; and (2) a review-on-the-record procedure in which recipients would be permitted to submit written statements showing why their benefits should be continued. Both options require seven days advance written notice of the reasons for a proposed termination, and both continue the provision for a post-termi-

nation "fair hearing." New York City chose to apply the second of these procedures to all its aid programs. Goldberg App. 368a–371a.

The district court concluded that this second procedure violated the Due Process Clause. Goldberg App. 380a–386a. It held that the first procedure—less immediately involved since all the plaintiff-appellants resided in New York City and accordingly would be processed under the second—would be permissible if construed to require both confrontation of persons whose credibility was in question regarding the factual basis for terminating benefits and that the reviewing officer be a superior of the person proposing the adverse action. Goldberg App. 386a–389a. The court noted that nothing in its opinion was "meant to affect the right to a post-termination hearing in accordance with the procedures already in existence," Goldberg App. 391a—*i.e.*, the "fair hearing" procedures required by federal law for programs under the Social Security Act and carried over by State law into State-funded general welfare programs. Thus, as in *Wheeler*, the court appeared to reach its conclusions in the context of an assurance that a full post-termination trial-type hearing would be had.

3. THE FEDERAL REQUIREMENTS APPLICABLE TO TERMINATING OR REDUCING WELFARE PAYMENTS

During the past few years, considerable attention has been focused on the operation of federally funded programs under the Social Security Act. Much of this attention has been directed to the questions of eligibility and level of welfare assistance, and the proce-

dures for determining these issues. As a result, those procedures have been in considerable flux. We set out below, first, the procedures that have been generally required until recent times of States participating in federal programs; and second, the current requirements, the product of changes of which most became effective July 1, 1968.

A. THE REQUIREMENTS PRIOR TO 1968

As originally enacted in 1935, the Social Security Act provided that each State plan for public assistance must provide for granting to any individual, whose claim for aid or assistance is denied, an opportunity for a "fair hearing" before the State agency. Sections 2(a)(4), 402(a)(4) and 1002(a)(4) of the Social Security Act, Public Law No. 271, 49 Stat. 620 *et seq.* The Social Security Act Amendments of 1950, 64 Stat. 477, 549, added the requirement that such hearings be afforded in cases where claims for benefits were not acted upon with reasonable promptness; otherwise, the provisions have continued without substantial change to the present.

On the basis of these "fair hearing" requirements and the Secretary's general authority to require that the States provide for such methods of administration as he finds necessary for proper and efficient operation, 42 U.S.C. 302(a)(5), 602(a)(5), the Secretary (like his predecessors, the Federal Security Administrator and the Social Security Board) has prescribed detailed procedural requirements for "fair hearings." Any claimant who is aggrieved by any agency action affecting his receipt of assistance, including termina-

tion, must be afforded a hearing if he requests one. The claimant must be informed of his right to a hearing, how to obtain it, and that he may be represented by counsel; and any clear expression of a desire to present his case to higher authority must be treated as an effective request. Hearings are to be conducted by impartial officers, in accordance with published procedures, at a time and place convenient to the claimant and after reasonable notice to him. At the hearings, the claimant must have an opportunity to examine all documents and records used at the hearing, refute any testimony or evidence, present his own evidence, witnesses, and testimony, advance all pertinent arguments and secure consideration of any factual or legal issue important to his claim. The decision must be based exclusively on the evidence and other material introduced at the hearing. Handbook §§ 6200, 6300; Brief for Appellants in No. 14, pp. 3a–9a. In short, while "[t]he hearing is conducted in an informal rather than formal court-type procedure in order to serve the best interests of the claimant [, it] * * * is to be subject to the requirements of due process." *Id.* at § 6400(a), p. 10a.

Although these procedures are followed at the "fair hearing," until recently the only requirement for agency procedures prior to termination or reduction of payments to individuals already receiving aid or assistance was that the payments must be continued until there had been a formal agency determination that the individual was no longer eligible or was eligible only for lesser amounts. That is, agencies could not terminate or reduce assistance pending in-

vestigations or the evaluation of information it had received. Handbook, § 2200(b)(4). But they were not required to inform recipients that an investigation or evaluation was under way or to permit them to participate in the process leading to this initial decision. Once the agency decided to terminate or reduce assistance, it could do so without advance notice or any hearing procedures and then notify the individual of his right to a "fair hearing."

The rules governing Federal funding operated in a way which probably encouraged the States to make these determinations promptly, and did not encourage involvement of the recipient at this stage. As a matter of overall policy, there is a strong interest in paying assistance to all individuals who are eligible, and in denying assistance to all individuals who are not eligible. There is also a need, in a Federal-State program, for a fair sharing between the Federal and State governments of the costs of those cases in which, despite the best efforts of the administrators to determine eligibility, payments are made to persons later found to have been ineligible. Accordingly, Federal matching funds are paid in cases where a State follows the correct procedures but erroneously determines that an individual is eligible. To this extent, the Federal government shares in the payment of ineligible cases, in the interests of orderly administration.

As a condition of such payments under the previous regulations, however, the Federal government insisted on speedy action, with respect to both the periodic regular reevaluation of all recipients and the special evaluations which the States are expected to undertake

upon receipt of information suggesting the possible ineligibility of particular recipients. Thus, if redeterminations of eligibility were not made within prescribed time periods and the recipient turned out to have become ineligible, Federal financial participation was not available for payments in periods beyond the deadline for making the redetermination. Handbook § 2200(d); § 5514, item 2a. Similarly, the State must investigate within 30 days any report of possible ineligibility received during the interim between regular reinvestigations. Handbook § 5514, item 2b. The periods allowed did not permit lengthy procedures.

As a result, where assistance was terminated or reduced and a "fair hearing" was then requested, the usual state practice was to leave the termination or reduction in effect pending the hearing. The States could continue the payments if they wished, but Federal financial assistance was not provided, and in practice the States did not ordinarily make such payments without Federal matching. If the hearing decision was in favor of the individual, the States could reinstate the payments prospectively, or they could pay for the back period. If they chose the latter course, they would receive Federal matching funds.

B. THE PRESENT REQUIREMENTS

The recent changes, most of which took effect on July 1, 1968, considerably modified the existing practice by requiring advance notice that adverse action is planned, and an opportunity for an informal conference before that action takes effect, and providing an enlarged scope of federal funding participation

during the process of assistance reduction or termination.

Thus, it is now required for participation in federally funded programs that when a question arises concerning change in a recipient's circumstances, the agency must give—

> advance notice of questions it has about an individual's eligibility so that a recipient has an opportunity to discuss his situation before receiving formal written notice of reduction in payment or termination of assistance. [Handbook § 2300(d)(5).]

This procedure is designed to serve several purposes in the public assistance programs. First, it gives the individual a chance to bring new or additional facts to the agency's attention; thus, he may be able to show, prior to any more formal action, that his situation has not actually changed, or has changed to a lesser degree than the agency believes. If he can thereby avoid termination of assistance, it benefits both the individual, who does not have his usual payments interrupted and need not seek a "fair hearing," and the agency, which will be spared the expense and staff time involved in an unnecessary formal hearing. Moreover, because this advance notice procedure must be followed in all cases, even those recipients who would not contest termination of assistance are given some time to prepare for the effect which it will have on their financial situations, eliminating the element of surprise.

It soon became obvious that states with information of possible ineligibility could not comply with this new requirement within the 30-day period allowed for

making a determination of ineligibility during which Federal matching continued. Accordingly, the States are now permitted an additional 30-day period of federal matching during which to give the advance notice, provide time for the recipient to obtain and appear at a conference, consider any new evidence or other relevant matters he may raise, and determine whether he is still eligible. Handbook § 5514, item 2c. The fact that the new period is this brief, however, shows that the conference is conceived as an informal and expeditious proceeding before local staff, not a trial-type "fair hearing" at the State agency level. It is merely a method of providing notice and screening out those cases which can be resolved by informal procedures.

After the advance notice procedure, the agency makes its determination on the basis of all the information it then has available. Assistance payments must be continued as before to this point. If the agency determines that assistance will be terminated or reduced, it must communicate this decision in writing to the individual and advise him of his right to request a "fair hearing" before the State agency. If a "fair hearing" is not requested, that is the end of the matter. If a hearing is requested, the State must hold it and take final administrative action within 60 days of the request,[5] Handbook § 6200(j), but is not re-

[5] The State is allowed an additional 30 days of federal matching to carry out the mechanics of discontinuing or reducing payments. Handbook, § 5514, item 2d. Thus, a total of three 30-day periods—for investigation of ineligibility, for the advance notice and conference, and for stopping the payment—are allowed for continuation of Federal matching of State payments to ineligible individuals and families.

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quired to continue assistance pending the hearing and decision. If the State does continue assistance, however, Federal matching funds now will be paid, Handbook § 6500(b), whether the hearing decision is in favor of the recipient or the agency. Two or three of the States continue assistance pending hearing. In all of the other States, if the hearing decision is in favor of the recipient, the agency is required to make corrected payments retroactively to the date of the incorrect action terminating or reducing payments, Handbook § 6200(k), and Federal matching funds are paid for these corrected payments, Handbook § 6500(a). (a).

In sum, under the currently applicable HEW requirements, assistance payments under federal programs may not be terminated or reduced until the recipient has been given advance notice and an opportunity for a conference, and the agency has made its determination. If the payments are terminated, the individual may obtain a "fair hearing" which comports with the customary requirements of due process before such termination becomes final. If the hearing decision is in favor of the recipient, corrective payments must be made retroactively. The state at its option may continue payments pending the hearing and, if it does so, there will be federal sharing in the payments regardless of whether the decision is in favor of the recipient or the agency.[8]

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[8] On August 20, 1969, the Secretary postponed from October 1, 1969, to July 1, 1970, the effective date of a new regulation requiring that, in cases involving questions of fact or judgment relating to the particular individual involved (as distinguished from cases involving the application of a gen-

SUMMARY OF ARGUMENT

No question has been raised that the trial-type hearing that is held at the request of the recipient of welfare assistance before the termination or reduction of his benefits becomes final, satisfies both the statutory requirement of "fair hearing" and the constitutional requirement of procedural due process. The issue here is the narrower one of the timing of such hearing: whether it must be held before there is any preliminary termination or reduction of benefits. We submit that the present administrative practice—under which the beneficiary receives advance notice of a proposed termination or reduction of his benefits, has the opportunity for informal conference with the staff of the State welfare agency before such action is taken, and can obtain a "fair hearing" before such termination or reduction becomes final—satisfies the statutory and constitutional requirements of fair hearing.

A. Where questions of administrative procedure are concerned, "the requirements of due process frequently vary with the type of proceeding involved" (*Hannah* v. *Larche*, 363 U.S. 420, 440). In the context of public welfare programs, these requirements also may vary

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eral policy to individual cases, see *infra*, pp. 33–35), assistance be continued until there has been a trial-type hearing. 34 F.R. 13595 (1969). A press release of the Department of Health, Education, and Welfare explained that the States are still putting into effect the federal requirements which became effective July 1, 1968, and are working out attendant problems, and that some States have taken the position that the effect of the new regulation will be to keep recipients on the rolls beyond the point of reasonable question about their eligibility.

with the nature of the programs adopted. We discuss only what procedures are required for the particular program here involved.

The determination of the appropriate procedures here requires a balancing of competing social policy considerations involving, on the one hand, the government's interest in avoiding improper expenditure of welfare funds and unduly burdensome procedures, and on the other hand the interest of the recipients of public assistance in fair treatment and proper receipt of the benefits Congress intended them to have. Since we are interpreting the statutory requirement that there be a "fair hearing," substantial weight should be given to the expert judgment of the Secretary that, on the basis of present experience with the operation of public assistance programs, the procedures he has adopted constitute the most appropriate method for accomplishing the congressional directive. The current procedures became effective only on July 1, 1968, and it is still too soon to make an adequate assessment of their effectiveness. The changes they have made have required substantial modifications by the States of their prior practice, and these modifications have not been completely achieved. If the present procedures should prove inadequate properly to accomplish the Congressional purpose reflected in the federal program here involved, the Secretary can make further changes. It is important, however, that his flexibility to do so should be preserved, and that fixed procedures should not be required.

There is a strong public interest in avoiding continuation of payments to persons who are not entitled

thereto, both to avoid improper disbursement of government funds and to prevent prejudice to the interests of eligible persons who would suffer if substantial sums were paid to ineligible ones. If benefits were required to be continued whenever a trial-type hearing was requested, the inevitable result would be the disbursement of significant amounts to persons ultimately found not entitled thereto.

B. If, contrary to our submission, the Court were to conclude that the present procedures are inadequate, it should not require a preliminary trial-type hearing in every case before payments can be initially terminated or reduced. Such a requirement, which the court below in No. 62 came close to adopting, would cause substantial and unnecessary delay in a large number of cases and would impose needless expense upon the welfare programs. Moreover, the court below in No. 62 apparently would require a trial-type hearing even where the only issue raised by the claimant is the validity of settled principles of general applicability—as, for example, a challenge to the general level of benefits. Requiring a trial-type hearing in every such case before benefits could be initially terminated would mean that persons who had no hope of ultimately prevailing because they are ineligible under the challenged practice nevertheless could continue to receive benefits until the hearing were held. A trial-type hearing ordinarily is not required before a general principle is routinely applied to a particular individual.

ARGUMENT

NEITHER THE DUE PROCESS CLAUSE NOR THE STATUTORY REQUIREMENT OF "FAIR HEARING" REQUIRES A TRIAL-TYPE HEARING BEFORE WELFARE ASSISTANCE PAYMENTS ARE TERMINATED OR REDUCED

No question has been raised in these cases that the trial-type hearing, accorded on request to the recipient of welfare assistance before the termination or reduction of his benefits becomes final, satisfies both the statutory requirement of "fair hearing" and the constitutional standard of procedural due process. The issue, rather, involves the timing of such hearing: whether, as the recipients contend, it must be held before there is any suspension, termination or reduction of benefits, or whether, as the Secretary believes, the constitutional and statutory requirements are satisfied as long as the recipient can obtain such "fair hearing" before there is a final determination as to whether his benefits are to be ended or reduced.

To state the issue another way, in the context of public assistance programs involving millions of recipients and thousands of possible hearings every year, do the essential elements of fair procedure require anything more than the present practice? Under that practice, (1) the beneficiary receives advance notice that his payments are to be terminated or reduced; (2) he has the opportunity for a conference with the staff of the welfare agency before such termination or reduction, at which the reasons for the action will be explained to him and he can present any facts or explanations showing why his assistance should be continued at its existing level; (3) if the state then termi-

nates or reduces assistance, he can obtain a "fair hearing" before the state action becomes final; and (4) if he prevails at such hearing, he receives back payments for the interim period during which his benefits were terminated or reduced.

Our submission is that the present procedures satisfy both the statutory and constitutional requirements of fair hearing, and that a trial-type hearing is not required before public assistance is suspended, terminated or reduced. It also follows, we believe, that welfare recipients are not entitled to a continuation of their previous benefits during the period between preliminary termination or reduction and the final decision of the state agency that is rendered after a "fair hearing" in those relatively few cases where such more formal proceeding is requested.

A. THE SECRETARY'S PRESENT PRACTICE—UNDER WHICH THE RECIPIENT OF PUBLIC ASSISTANCE IS GIVEN NOTICE AND OPPORTUNITY FOR A CONFERENCE PRIOR TO TERMINATION OR REDUCTION OF ASSISTANCE AND CAN OBTAIN A TRIAL-TYPE HEARING BEFORE SUCH TERMINATION OR REDUCTION BECOMES FINAL—SATISFIES THE STATUTORY AND CONSTITUTIONAL REQUIREMENTS OF A FAIR HEARING

1. Neither any of the parties nor the United States disputes that the Due Process Clause of the Fourteenth Amendment and, for the District of Columbia, the Fifth Amendment to the Constitution, are applicable to public welfare programs. Although there is no constitutional requirement that such programs exist—so that access to benefit payments could be described for some purposes as a "privilege" rather than a "right"—the fact of their existence carries with it the guarantees against governmental capriciousness

and arbitrariness embodied in those clauses. *E.g.*, *Sherbert* v. *Verner*, 374 U.S. 398; *Shapiro* v. *Thompson*, 394 U.S. 618, 627 n. 6. This observation, however, serves only to frame the question of what procedures are to be followed in benefit termination cases, not to answer it. For where questions of administrative procedure are concerned, as distinct from the issues of capriciousness and arbitrariness involved in the cited cases, "the requirements of due process frequently vary with the type of proceeding involved." *Hannah* v. *Larche*, 363 U.S. 420, 440. As the Court explained in *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895:

> [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action. * * *

There would be significant differences, for example, in the procedures necessary in a zoning case, a prosecution for a capital crime, a garnishment, a suspension of a government employee, or the termination or reduction of public assistance.

2. In the context of public welfare programs, we believe those requirements might also vary with the nature and aims of the programs adopted. If a State wished to—and assuming it constitutionally could—revert to programs for dispensing charity to the "worthy poor," it might be permitted far different procedures than would have to attend programs whose purposes include promotion of equity among all recipients and their freedom from the private charity

giver's traditional control. In view of these possible variations, we address ourselves only to the question what due process requires for the federally funded programs here at issue. For their purpose is clear.

> When the Social Security Act was passed its public assistance titles were designed to bring about, for the population groups to which they applied, important changes in the manner of dispensing aid to the needy. The public almoner had been prone to assume the prerogatives of the giver of private charity, to grant or withhold according to his judgment of the deserts of the applicant, and often to assume a paternalistic control over the lives of those he aided. The Social Security Act sought to introduce into this field a government of laws, and to that end, among others, attached a series of conditions to its proffer of federal grants-in-aid to the states. One of the conditions requires that the state grant a fair hearing to any applicant who is denied assistance; others look to uniform application of the plan throughout the state, to equitable treatment of persons in differing economic situations, and to the safeguarding of information about applicants and recipients; while the definition of assistance as "money payments" calls for the giving of cash with no strings attached. [Willcox, *The Lawyer in the Administration of Nonregulatory Programs,* Public Administration Review, Vol. XIII, No. 1, Winter 1953, 12, 15–16.]

In thus legislating to provide for the general welfare, the Congress authorized the use of Federal funds to furnish part of the cost of payments made under State public assistance plans. However one may charac-

terize the interest of the beneficiaries of such programs, it certainly is less tangible than that of the beneficiaries of the federal old-age, survivors' and disability insurance program. For under the latter program the potential beneficiaries pay taxes therefor that are placed in a trust fund so that, unlike the public assistance benefits here involved, payments are not dependent upon yearly Congressional appropriations. Yet even under that program the "right" to benefits is not protected under the Fifth Amendment in the manner of personal property (*Flemming* v. *Nestor,* 363 U.S. 603), and benefits are terminated, reduced or suspended without a prior trial-type hearing.[7]

The statutory mandate that there be a "fair hearing" before public assistance payments are denied helps to define the kind of protection that Congress intended to give the beneficiaries of such payments. The statute does not distinguish between the initial denial of applications for benefits and their subsequent denial by termination. When a State agency decides initially that a new applicant for benefits is not entitled thereto, it does so without first holding a trial-type hearing; such a hearing is held only if the applicant requests it; and when such a hearing is sought,

[7] While there are differences between the public assistance and the old age survivors' and disability insurance (OASDI) programs, a requirement that the States must continue public assistance payments pending the "fair hearing" would be inconsistent with the practice authorized under the Social Security Act for the OASDI program, which is directly administered by the Federal government and involves insurance benefits to which individuals have a statutory "right." N. 11, *infra.*

benefits are not paid in the interim.[8] It has never been suggested that this procedure denies the applicant a "fair hearing."

As we develop below, cogent policy considerations support the Secretary's judgment that the same practice should be followed where, following the informal conference procedure, the State initially decides to terminate or reduce benefits. This practice not only accords with the statutory requirement that there be such a hearing before a claim for assistance is "denied," but is further supported by the statutory provisions authorizing the Secretary to adopt such methods of administration as he finds to be necessary for the proper and efficient operation of public assistance plans. 42 U.S.C. 302(a)(5), 602(a)(5).

3. The determination of what procedures and timing are appropriate in an administrative proceeding of this type requires a balancing of competing social policy considerations. On the one hand, there is the interest of the government in insuring that the procedures do not become either so unnecessarily expensive or so time-consuming and cumbersome that their ultimate effect is to hinder rather than aid in the effectuation of the public policies the program reflects. On the other hand, there is the interest of the persons affected—here the recipients of public assistance—in being fairly treated and in properly receiving the benefits they rightfully can expect the program to

[8] If the applicant prevails at such hearing, benefits are paid retroactively to the date of the initial (but erroneous) denial.

accomplish. These two interests are complementary rather than antithetical. For welfare recipients would suffer in the long run if the government were required to follow inefficient and unnecessarily burdensome requirements, while the public interest would suffer if the recipients were not treated fairly.

Moreover, since we are dealing with the interpretation of the statutory command that there be a "fair hearing," it is appropriate to give considerable weight to the expert judgment of the Secretary that, on the basis of our present experience with the operation of public assistance programs, the procedures he has adopted constitute the most appropriate method for accomplishing the congressional directive.

The current procedures have been in effect only since July 1, 1968, and it is still too soon to make an adequate assessment of their effectiveness in properly accommodating the competing policy considerations. The introduction of the new informal conference procedure and the establishment of the 60-day period for completing trial-type hearings when requested came at a time when an increasing number of public assistance recipients were challenging agency decisions, were represented by counsel and were requesting "fair hearings." In order to handle this increased workload, the States had to hire and train more hearing examiners and to appropriate funds for their employment. Although the States have made substantial progress in solving these problems, they have not been fully surmounted. Moreover, in some States a large number of public assistance recipients have requested "fair hearings" to challenge basic aspects of the particular wel-

fare program involved—contending, for example, that the level of benefits is inadequate.[9] Challenges of this type inevitably lead to extensive delay in the hearing and decision of all pending cases.

The nature of public assistance programs inevitably requires considerable room for experiment and change in determining, through trial and error, what are the most effective methods for carrying out the programs. It is therefore important that flexibility in adjusting the procedures to changing circumstances remain available to the Secretary. Significant changes recently have been made in the procedures, and if they should prove inappropriate in the light of experience in working with them, the way always is open for the Secretary to modify them still further. At this stage of their development, however, the procedures should

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[9] For example, during the week of January 29, 1969, there were approximately 500 requests for hearings in the Miami, Florida, area challenging the amount of assistance and the method of its computation. In seven counties in Kentucky in July 1969 there were 417 requests for hearings challenging determinations of ineligibility that had resulted from a change made by the State of Kentucky in its definition of unemployment. In December 1968 and January 1969 in Los Angeles County, California, there were 222 requests for hearings on the contention that the amount of benefits was inadequate; in Hinds County, Mississippi, in July 1967 there were 184 requests for hearings on the same question. In October 1968 in Philadelphia, Pennsylvania, there were 275 requests for hearings on a claim that each child should receive $50.00 to have an American Christmas.

In addition, there have recently been several instances in which a large number of requests have been made for a hearing on a single issue. For instance, in New York City in November 1968 there were approximately 3,000 requests for hearings on whether the recipient needed a telephone.

not be frozen into the fixed molds into which the public assistance recipients would push them.

4. Tested by these standards, we submit that the Secretary's present procedures for terminating welfare payments meet the statutory and constitutional requirements of a fair hearing.

In view of Congress' choice to require a "fair hearing" for aggrieved claimants of benefits under the Social Security Act and the implications of that choice for the nature of the benefit program, *supra*, p. 22, we do not argue that it is "possible to characterize [the receipt of benefits under the Act] as a mere privilege subject to the Executive's plenary power," so that "notice and hearing are not constitutionally required." *Cafeteria Workers, supra,* 367 U.S. at 895. Nonetheless, the privilege aspect of receipt of benefits colors both the government function and the private interest involved in a way which bears directly on the *prior* hearing question.

As a matter of government function, it is reflected in the right of the federal and state governments to place budgetary limitations on the total expenditures they will undertake for these programs. More dramatically than a simple desire for efficiency or low cost, such limitations make an accurate allocation of funds to eligible persons imperative; if large numbers of ineligible persons are able to enforce a right to receive benefits for substantial periods of time, the effect will be to reduce the amounts available for sharing by eligible recipients. It seems predictable that if payments are continued pending "fair hearing" there will be more requests for such hearings,

and more payments will be made to ineligible individuals.

The full effect of continuation of payments pending hearing would be experienced only over a period of years. At present, information is scanty. Mississippi, however, in August 1968 put into effect a policy of continuing assistance pending "fair hearing" in cases of termination of assistance. For the year ended June 30, 1969, the increase over the previous year in the number of hearings requested was substantially greater in cases involving termination of benefits than for all welfare cases; the latter increased roughly 40 percent, from 772 to 1059, while the former increased approximately 200 percent, from 97 to 288. Of the 288 requests for hearings in 1968–1969 involving termination of benefits, 46 were withdrawn prior to hearing, one claimant died before hearing, 26 cases were pending on July 1, 1969, and 215 decisions were rendered. 50 decisions were in favor of the claimant, and 165 decisions upheld the agency's determination. Thus, on the basis of the "fair hearing" decisions, the claimant was ineligible in 77 percent of the cases where assistance was continued. In the prior year, when benefits were not continued pending hearing, 57 hearings were held in termination cases; the claimant prevailed in seven, and the State agency in 50.

Moreover, the cognizable private interest in continued receipt of welfare benefits pending hearing is more tentative than a direct interest in property as such. The issue is not whether a present asset is to be taken away from its owner, but whether the recipient shall continue to share in a limited resource although (un-

like others) his eligibility is in serious doubt. There could be no legitimate interest in a prior hearing simply as a means by which ineligible persons could prolong the time during which they continue to receive benefits at the expense of the general public and, possibly, of eligible recipients. The interest arises because some individuals in fact are, or have a sound claim that they are, eligible despite a preliminary determination to the contrary, and therefore, should not be made to suffer such hardships as are set out in the complaints. Thus, as would not be true of property determinations, assessment of the individual's stake in a prior hearing depends on how often the individuals requesting such hearings prevail.

The present case is therefore unlike *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, where the Court invalidated, under the Due Process Clause of the Fourteenth Amendment, a State procedure by which wages could be garnished without prior notice to or opportunity for hearing for the wage earner. The key to that decision was that "[w]e deal here with wages—a specialized type of property presenting distinct problems in our economic system" (p. 340). Both the majority opinion and the concurring opinion of Mr. Justice Harlan made plain that the State procedure was invalid because garnishment involves the immediate taking of a wage earner's "property"; and the Court stated (p. 339) that although "[s]uch summary procedure may well meet the requirements of

due process in extraordinary situations,"[10] garnishment by a wage earner's creditor was not such a situation. In the present case, however—as in cases involving government employment, licenses, and other benefits commonly dealt with through the administrative process—the recipients have no property (in the classic sense) of which the government is seeking to deprive them. In cases involving the question what procedural due process required in this "property"-less context, this Court has several times indicated that the answer permissibly varies with the proceeding and private interests concerned.[11] *E.g., Hannah* v.

[10] The class of "extraordinary situations" is large enough to include summary actions to protect government revenues. *Phillips* v. *Commissioner*, 283 U.S. 589, 595–597. Thus, even should this Court conclude that this case does fall within the teaching of *Sniadach*, it does not follow that hearings *prior* to termination or reduction are constitutionally required. It would be necessary to assess whether in the welfare context any threat to government revenues posed by a requirement of prior hearing is so great as to justify summary procedure.

[11] Statutory solutions to the problem have not been uniform. A license to use part of the limited broadcast spectrum may not usually be suspended before notice and hearing, 47 U.S.C. 312 (c); and see 5 U.S.C. (Supp. IV) 558(c); but there is explicit statutory authority to suspend benefits under the Federal Old Age, Survivors, and Disability Insurance Benefits Program before hearing, 42 U.S.C. 403(h)(3), if it appears that there is a danger of overpayments being made, and federal employees are regularly suspended from their employment in advance of the hearings to which they are entitled under the Civil Service Act. As in *Phillips*, *supra*, n. 10, the direct involvement of government revenues in the latter cases may justify a procedure more summary than would be appropriate where a benefit without cost to the government, such as a broadcast license, is concerned. Similarly, in case of "jeopardy," federal taxes may be assessed and collected without any opportunity for prior hearing. Internal Revenue Code, 26 U.S.C. 6861–6864.

Larche, 363 U.S. 420, 440; *Cafeteria Workers* v. *McElroy,* 367 U.S. 886, 894–895.

The present statistics show that substantially more ineligible than eligible individuals request "fair hearings".[12] Moreover, if plaintiffs prevail, both the number and proportion of ineligible individuals requesting fair hearings might increase. Such a change might reflect either a substantial degree of use of "fair hearing" requests as a means of prolonging benefit payments for individuals who clearly are no longer eligible, or, as the appellant in No. 62 suggests in his brief, pp. 13–17, the efficient functioning of the relatively new pre-hearing notice-and-conference techniques. In either case, the argument for "fair hearing" prior to termination or reduction of benefits would be even less strong than it is now.

[12] While a substantial proportion of "fair hearings" have in the past led to reversal or modification of adverse agency determinations, only a small proportion of terminations result in requests for such hearings. Thus, forms submitted by California to the National Center for Social Statistics of the Department of Health, Education and Welfare show that in the period July 1, 1968, to March 30, 1969—during which the Brief for Appellants in No. 14 states there were 20 "fair hearings" concerning termination of assistance, p. 13, n. 12—there were a total of 163,635 terminations of assistance under Social Security Act programs. Of these, 98,982 represented termination of assistance under the Aid for Families with Dependent Children program, and the remainder, the various adult programs.

Statistics collected in the annual reports of the Department's Nationwide Quality Control System on Public Assistance Case Actions for the year April 1, 1967, to March 31, 1968, show that local agencies in the nation as a whole incorrectly withheld or terminated benefits in 5.6 percent of AFDC and 4.0 percent of adult program cases, and underpaid benefits in 11 percent of AFDC and 9 percent of adult program cases. On the other hand, 1.6 percent of AFDC cases and 1.7 percent of adult pro-

The currently applicable Federal requirements strike the balance fairly in the light of what is presently known. The individual has advance notice of termination or reduction of assistance and opportunity for conference. Such conference provides an informal, expeditious procedure available to all recipients with respect to whom the agency is contemplating termination or reduction of payments. Everyone is thus informed of the proposed agency action in advance and can get an explanation; if he can show that the contemplated action is incorrect, it can be averted. The emphasis is on notice, communication, and screening out those cases where the agency can readily be shown it is making a mistake, or the recipient can be given information so that he understands why he is ineligible. The risk of incorrect State actions is thereby reduced. If the State agency then determines that the termination or reduction is justified, the claimant is afforded opportunity for a trial-type hearing, which is to be conducted expeditiously. In the minority of cases where the agency action turns out to be incorrect, corrective payments are made.

The procedure thus provides an expeditious method for handling a large volume of cases in a way that gives all welfare recipients the opportunity to explain

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gram cases involved incorrect determinations that recipients were eligible, and 10.4 percent of AFDC and 10.1 percent of adult program recipients were being overpaid during this time. These figures are compiled by State quality control units on the basis of a controlled sampling of local agency case files and are entirely independent of "fair hearing" procedures. These latter figures, however, cover total terminations, and we do not know in how many instances hearings were requested.

to the State agency in advance why their payments should not be terminated or curtailed, with the assurance of a trial-type hearing before such State action becomes final. It satisfies both the statutory and constitutional command of fair hearing.

B. IF THE COURT WERE TO CONCLUDE THAT THE PRESENT PRACTICE IS INADEQUATE, IT SHOULD NOT REQUIRE A PRELIMINARY TRIAL-TYPE HEARING IN EVERY CASE BEFORE PAYMENTS CAN BE INITIALLY TERMINATED OR REDUCED

A principal interest of the United States in this case is to avoid a proliferation of hearings and procedures which would substantially burden the administration of the Social Security Act without conferring material benefit on eligible recipients. The district court in No. 62, however, failed to adopt this perspective. Upon concluding that due process requires more substantial proceedings prior to termination, the court's solution was to enlarge and expand the advance notice and informal conference procedure which is required before the agency redetermines eligibility. By adding the various procedural elements which it concluded are required by due process at that early stage, the court made two significant changes in the overall procedure.

First, the conference is no longer a conference; it is something close to a full-dress hearing at which witnesses must appear, and the recipient has the right to question them, etc. Indeed, the court stated: "We realize that these requirements will duplicate the 'fair hearing' post-termination procedure to some extent." Goldberg App. 385a. Thus, there may be two hearings in each case, the pre-termination and the post-termi-

nation hearing. This seems unnecessary and potentially expensive. Most likely, the 30-day time period now provided for the advance notice and conference procedure will be inadequate in many cases, so that additional time will be needed before the agency can determine whether the recipient has become ineligible. Moreover, the procedure may often prove inadequate to handle cases involving complex factual situations. Finally, it might so burden the agency staff as to add further delays before these matters can be finally resolved—a result as detrimental to welfare recipients as to the agency. Such a procedure does not appear to be conducive to the proper and efficient operation of the welfare program.

The second, and closely related, difficulty arises from the requirement that assistance be continued in all cases until the agency's initial determination, which is made after the first conference-hearing and which, because of the new procedure required for all cases, necessarily will further delay the administrative process at a point where it is already overburdened and dilatory. The added expense to the federal and State agencies could be considerable.

The seriously adverse effect of the decision below in No. 62 is compounded by its application even to cases where the claimant challenges only the provisions of law or settled agency policy. At least one of the appellees in that case, Mrs. Altagracia Guzman, appears to present only such an issue in her complaint. Mrs. Guzman's AFDC payments are alleged to be in imminent danger of termination because she refuses to assign to New York welfare authorities her right of action

against her husband for non-support and, in accordance with an established policy, they therefore threaten to terminate her benefits. She denies neither the facts nor the policy's applicability to her, but simply asserts that the policy "has no support at law and indeed is contrary to the statutes of New York State." Goldberg App. 25a. The court below did not exclude her from the relief granted.[13]

If every individual subjected as a matter of course to the adverse impact of a general administrative policy could require that his benefits be continued pending a trial-type hearing on the lawfulness of that policy, this could almost paralyze the administration of the Act and would add immeasurably to its costs. The effect of requiring trial-type hearings in all such cases would be that persons who could hope to obtain no vindication from the procedures thus invoked[14]

[13] Its failure to do so may have been inadvertent. At one point in its opinion the court noted that "We do not deal here with the issue whether procedural due process requires the right to oral argument on a matter of law. See FCC v. WJR, 337 U.S. 265, 276 * * *. It is true that [*Morgan* v. *United States*, 298 U.S. 468, 481] contained the dictum that '[a]rgument may be oral or written,' * * * but we do not take that to mean that in this case there is no constitutional right to present evidence, as opposed to argument, in person." Goldberg App. 381a. The fact that one of the plaintiffs in fact did wish only to produce arguments, not evidence, appears not to have been adverted to in the proceedings below.

[14] Under the existing HEW regulations, any claimant or recipient of assistance can obtain a "fair hearing" if he is "aggrieved by * * * agency action affecting his receipt or termination of assistance, or by agency policy as it affects his situation." Handbook, § 6200(b). We are informed that the practice under this regulation is to provide "fair hearings" on complaints which, like Mrs. Guzman's, raise only issues of general policy.

because they are ineligible under the policy challenged could continue to receive benefits until the hearing was held. The cost of this delay would have to be borne by the community as a whole and, if total funds available for benefit purposes were limited, by other recipients under the program in the form of reduced benefit levels. Indeed, if prior "fair hearings" were required for each individual adversely affected by a general policy change, they would be required where insufficiency of funds required across-the-board reductions in benefit levels.

A trial-type hearing is not required before such a general rule is applied to a particular individual, unless there are demonstrable special reasons for different action in the individual case. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192; *Federal Power Commission* v. *Texaco*, 377 U.S. 33; *Conley Electronics Corp.* v. *Federal Communications Commission*, 394 F. 2d 620, 626 (C.A. 10). "Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. * * * There must be a limit to individual argument in such matters if government is to go on," *Bi-Metallic Investment Co.* v. *State Board of Equalization of Colorado*, 239 U.S. 441, 445. Mrs. Guzman does not allege any special circumstances in her case; she challenges only the general rule.

CONCLUSION

The judgment of the district court in No. 14 should be affirmed. The judgment of the district court in No. 62 should be modified to eliminate the conditions imposed by the court as to the first procedure permitted by the New York statute and, as thus modified, should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
WILLIAM D. RUCKELSHAUS,
Assistant Attorney General.
ROBERT V. ZENER,
STEPHEN R. FELSON,
Attorneys.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

JACK R. GOLDBERG, Commissioner of Social Services of the City of New York,

Appellants,

—v.—

JOHN KELLY, *et al.*,

Appellees.

MAE WHEELER, *et al.*,

Appellants,

—v.—

JOHN MONTGOMERY, Director of the State Department of Social Welfare, and RONALD BORN, General Manager of the San Francisco City and County Department of Social Services,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE SOUTHERN DISTRICT OF NEW YORK AND THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF IN REPLY TO THE UNITED STATES AS *AMICUS CURIAE*

PETER E. SITKIN
STEVEN J. ANTLER
SIDNEY M. WOLINSKY
CHARLES STEPHEN RALSTON
1095 Market Street
San Francisco, Calif. 94103

Attorneys for Appellants in No. 14

EDWARD V. SPARER
MICHAEL S. ZOLA
WINTON D. WOODS, JR.
Of Counsel

LEE A. ALBERT
STEVEN J. COLE
NANCY DUFF LEVY
LUCY V. KATZ
Center on Social Welfare Policy and Law
401 West 117th Street
New York, New York 10027

Attorneys for Appellees in No. 62

(Counsel continued on inside cover)

MARTIN GARBUS
Roger Baldwin Foundation
of the American Civil
Liberties Union
156 Fifth Avenue
New York, New York 10010

HAROLD J. ROTHWAX
DAVID DIAMOND
DAVID GILMAN
MARIANNE ROSENFIELD
PETER H. DARROW
STEVE WIZNER
MFY Legal Services, Inc.
320 East Third Street
New York, New York 10009

Attorneys for Appellees in No. 62

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

Nos. 62 and 14

JACK R. GOLDBERG, Commissioner of Social Services of the City of New York,

Appellants,

—v.—

JOHN KELLY, *et al.*,

Appellees.

MAE WHEELER, *et al.*,

Appellants,

—v.—

JOHN MONTGOMERY, Director of the State Department of Social Welfare, and RONALD BORN, General Manager of the San Francisco City and County Department of Social Services,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE SOUTHERN DISTRICT OF NEW YORK AND THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF IN REPLY TO THE UNITED STATES AS *AMICUS CURIAE*

Appellees in No. 62 and Appellants in No. 14 jointly submit this brief in reply to the Brief for the United States as *Amicus Curiae,* in which the Government now argues that the currently applicable H.E.W. policies, said to represent the "expert judgment of the Secretary" on "cogent policy considerations," Gov. Br. 23, 24, should control the constitutional standards for termination of welfare payments. This position stands in sharp contrast with, at times in opposition to, the exposition of the United States as *amicus curiae* below in *Goldberg* v. *Kelly* of the very same federal regulatory policies invoked here and of their relevance to constitutional standards. We have therefore reprinted in full the Government's earlier exposition in the Appendix to this Reply.[1]

I.

Let us first put aside the Government's intimation that this constitutional attack on state administrative practices draws into question, in some undefined manner, the "fair hearing" provision of the Social Security Act or the currently applicable H.E.W. regulatory policy. The constitutional validity of neither is under review in this Court. The challenged terminations of public assistance benefits were effected by state and local administrators under state law and administrative policies. No federal statute or regulation requires (or, as we shall establish, encourages) such terminations without a hearing. It is

[1] The brief *amicus curiae* of the United States in *Goldberg* v. *Kelly* was submitted to the three-judge district court in October, 1968, in response to that court's request to the Attorney General for the views of the United States.

state administration of these programs generally which entails the eligibility problems and abuses necessitating constitutional accountability. As the United States said and reiterated in its *amicus* brief below:

> "As for the AFDC program, whether the plaintiff-clients or the defendant-State and local agency should prevail in this case, it appears, as will be discussed below, that there will be no violation of Federal requirements." Reply App. 2a.

Our attack on state regulations does not question the constitutionality of the "fair hearing" provisions of the Social Security Act, 42 U.S.C. §§302(a)(4), 602(a)(4), 1202(a)(4), 1352(a)(4), 1382(a)(4).[2] Although Congress, as is its wont in such procedural matters, did not attempt to define what was "fair" over the entire spectrum of disputes between an applicant or recipient and the agency, no inference may be drawn therefrom.[2a] All that can fairly be said from the statutory command of a "fair hearing" is that Congress intended the customary requirements of fairness embodied in procedural due process to govern welfare hearings. H.E.W. has so interpreted the term in specifying at length the manner in which the states must conduct the hearing. H.E.W. Handbook, Pt. IV, §§6200-6400. H.E.W.'s regulation providing continued federal participation where the state maintains assistance pending the hearing decision, H.E.W. Handbook, Pt. IV, §6500(b), ob-

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[2] These provisions are applicable to state programs for Old Age Assistance, Aid to Families with Dependent Children, Aid to the Blind, Aid to the Permanently and Totally Disabled and Aid to the Aged, Blind and Disabled, respectively.

[2a] In the one instance in which Congress enacted requirements dealing solely with recipients, the Work Incentive Program, it required a hearing prior to withdrawal of aid for refusal to accept employment. 42 U.S.C. §633(g).

viously is premised on an interpretation of congressional intent not inconsistent with a prior "fair hearing."[3]

Moreover, the failure of the currently applicable federal regulations to *require* a prior hearing as a prerequisite to approval of a state plan cannot be construed as a constitutional judgment of the Secretary or a constitutional deficiency in the federal regulations. The H.E.W. procedural regulations at any point in time represent the *minimal* federal requirements for continued funding of a state welfare program. Reply App. 2a. Because of the exceedingly difficult problems of administrative enforcement of federal requirements, cutoff of federal funds to the states being the only sanction, H.E.W. has not taken an expansive view of its statutory powers generally, see *King* v. *Smith*, 392 U.S. 309, 337-38 (1968), or specifically of its vague authority to require "proper and efficient" methods of administration. 42 U.S.C. §§302(a)(5), 602(a)(5), 1202(a)(5), 1352(a)(5), 1382(a)(5).[4] As a result, federal regulatory pol-

[3] The Government alludes to, but does not quite rest upon, a literal reading of "a fair hearing . . . to any individual whose claim for aid . . . is denied" to obliterate any distinction between applicants and recipients of aid. Such a literal reading would contradict H.E.W.'s own settled construction of the statute requiring a "fair hearing" for any agency action adversely affecting an individual's situation, monetary and non-monetary, H.E.W. Handbook, Pt. IV, §6200(b), and also contradict H.E.W.'s interpretation evinced in its prior hearing regulation, which does, after all, implement the statutory "fair hearing" provision. 45 C.F.R. §205.10. This reading would also seemingly require persons terminated to reapply for aid as a prerequisite for the hearing, a practice that H.E.W. has found offensive to the federal act. See *In the Matter of The Conformity of the Louisiana Plan for Aid to Dependent Children Under Title IV of the Social Security Act*, in P. DODYK, CASES AND MATERIALS ON LAW AND POVERTY 131-136.

[4] H.E.W.'s skittishness under this provision may be seen not only in the postponement of the effective date of the prior hearing regulation, but also in a similar postponement of the regulation re-

icy often does not reflect vigorous pursuit of the central purpose of the federal programs—protection of the economic security of individuals in need. Nonetheless, the states are at the very *minimum* obliged to obey the dictates of constitutional standards. *Shapiro* v. *Thompson,* 394 U.S. 618, 633 (1969). This is so whether or not these dictates are embodied in the applicable federal regulations. While H.E.W. may not, of course, continue to fund a state program found to be administered in an unconstitutional manner, *Shapiro* v. *Thompson, supra,* like other administrative agencies it does not possess, nor has it assumed, the power to resolve disputed constitutional questions that have not been authoritatively settled in the courts, *Engineers Public Service Co.* v. *S.E.C.,* 138 F. 2d 936 (D.C. Cir. 1943), *judgment vacated and case remanded as moot,* 332 U.S. 788 (1947); *Panitz* v. *District of Columbia,* 112 F. 2d 39 (D.C. Cir. 1940), though it quickly moves to implement such decisions by regulations, *e.g.,* 45 C.F.R. §203.1 (Aug. 8, 1968); 45 C.F.R. §202.3 (May 29, 1969). H.E.W. has not purported to exercise such a power here. As the Government succinctly explained below, "it does not appear that the validity of the Federal policies under either the Federal statute or the Constitution is in issue here." Reply App. 3a. The identical federal policies prevail today.

The standards which were left by Congress for judicial determination in accordance with general principles of procedural due process can mean no less in welfare hearings

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quiring provision of attorneys at fair hearings, 45 C.F.R. §§205.10, 220.25(a) (as amended Aug. 19, 1969), and in the repeal, in effect, of the regulation requiring use of the declaration method to establish eligibility, 45 C.F.R. §205.20 (Jan. 17, 1969).

than in customary administrative decision making. See *Goldberg*, Br. for Appellees 43-45. Among these standards is a well-founded and established distinction between initial denial and revocation of statutory rights, entitlements or privileges, *Gonzales* v. *Freeman*, 334 F. 2d 570, 575 (D.C. Cir. 1964); *Shaughnessy* v. *United States*, 345 U.S. 206 (1953); *Greene* v. *McElroy*, 360 U.S. 474 (1959), which is as valid and recognized in the welfare context as in all others.[8]

II.

The Government's repeated assertion that the Secretary has confronted and acted upon "cogent policy considerations" in opposition to prior hearings cannot be reconciled with the Secretary's official expression of federal policy in

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[8] By hypothesis the recipient of aid is far more dependent and vulnerable than the applicant. The recipient has been found fully eligible, which means without resources or income, employment or opportunity for employment. Such persons must yield whatever resources they come by to the welfare department. They therefore await and expect the bi-weekly check to cover the most immediate of needs—shelter, food and clothing. They are also more exposed to arbitrary treatment stemming from their ongoing personal relationship with a caseworker who administers their subsistence grant.

Federal and state welfare regulations well recognize the difference. H.E.W. makes clear that aid may not be revoked without an administrative finding, supported by clear evidence, of ineligibility, H.E.W. Handbook, Pt. IV, §§6100, 6200; aid, however, may be denied unless the applicant establishes eligibility, H.E.W. Handbook, Pt. IV, §§2000-2999. The statute also provides that the applicant for aid may receive temporary assistance during the 30-day period allowed for investigation of eligibility, 42 U.S.C. §606(e)(1). The terminated recipient deemed ineligible most often may not reapply or receive emergency assistance, but rather must wait the far longer and more uncertain period for the fair hearing to re-establish eligibility. The situations are not, as the Government implies, comparable.

the H.E.W. regulations. These regulations, at the time of the Government's brief below and now, both accommodate and in large part endorse the due process standards relied on here. Upon exposure of the due process claim in these cases, but before any decision, H.E.W. added to the fair hearing provisions authorization for states to continue aid pending the "fair hearing," without loss of federal matching funds. Those funds are now available for all attendant expenditures, including benefits paid during the interim period. H.E.W. Handbook, Pt. IV, §6500(b). As the Government explained below, Reply App. 3a, federal matching provisions often go beyond coercive federal conditions, in order to encourage, hardly discourage, a specified method of administration.[6] This currently applicable federal policy embodied in the matching provision hardly bespeaks a considered administrative judgment that prior hearings impose an unwarranted fiscal burden on federal revenues or create a likelihood that "large numbers of ineligible persons [will or might] enforce a right to receive benefits for substantial periods of time." Gov. Br. 26.[7] At the same time, H.E.W. also expanded from 30 to 90 days the federal matching periods in which the local agency investigates ineligibility and conducts its own termination proceedings. H.E.W. Handbook, Pt. IV, §5514(2). Being at least equal to the 60 days theoretically allowed for the state "fair hearing," the enlarged period certainly accommodates a

[6] Statutory matching provisions are often designed to accomplish the same purpose. New services provided by Congress for AFDC recipients in January 1968 were attended by liberal matching provisions to encourage the states to make use of these measures. 113 Cong. Rec. at 23055, 90th Cong. 1st Sess. (Rep. Mills).

[7] The regulation was promulgated with full appreciation of the tardiness of the state-administered "fair hearing."

hearing procedure before the local agency.[8] To diminish a part of the fiscal incentive for termination followed by a dilatory hearing process, H.E.W. departed from the general rule that aid may be afforded for current needs only, by requiring the states to make retroactive payments where termination is later reversed in the "fair hearing." H.E.W. Handbook, Pt. IV, §§6200(k), 6500(a).

Finally, on January 23, 1969, the Secretary promulgated the prior hearing regulation requiring continuation of aid in, it now appears, all termination cases except challenges to constitutional or statutory validity.[9] Although recently

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[8] Candor requires the observation that all of these time periods have been and remain largely theoretical, save perhaps for the required periodic reinvestigation every three or six months in AFDC, since that entails an entry at that time in the individual case record. The 30-day federal matching rule for acting upon information indicating possible ineligibility was and remains in the judgment of the case unit to decide when such information warrants investigation. That decision is in most cases made at the time of the follow-up and then reflected in the case record. There is no direct federal or state supervision of the line workers and state procedures are usually not designed to interfere with the flow of federal matching funds.

As we have seen, the federal 60-day period for "fair hearings" was and remains exhortatory; there is no federal action, short of defunding the state program, for dilatory "fair hearings." *Goldberg*, Br. of Appellees 59-61.

[9] The regulation appears at *Goldberg*, Br. of Appellees 62. While not an example of clarity to be easily applied by welfare officials, see *Goldberg*, Brief of National Institute for Education in Law and Poverty as *Amicus Curiae* 54 (hereinafter Br. of Institute), and *Goldberg*, Br. of Appellees 56, "issue of fact, or of judgment" has been interpreted by the Government to include all termination disputes except those involving questions of statutory or constitutional validity. The Government would seek to preclude hearings prior to termination "where the claimant challenges only the provisions of law or settled agency policy." Gov. Br. 33. The recipients terminated in these cases do not make such challenges and would be fully satisfied if prior hearings were afforded in all other cases of termination. We agree that questions of statutory

postponed to July 1970, and practically unmentioned in the Government's brief, the regulation was not repealed and *currently* represents a federal policy which the states must plan to implement. It was not an intent to observe the experiment said to be contained in the "substantial modifications" effective July 1968, and certainly not to allow the states time to digest these earlier "modifications," see, *infra*, pp. 10-13, that accounts for the postponement. The delay, as California candidly admits, *Wheeler*, Br. for Appellees 18-19, was a response to the vigorous political opposition of many states to this and other recently promulgated procedural regulations.[10] This political concession to the states cannot properly be considered a part of the administrative expertise of the Secretary; nor is it evidence of any cogent policy considerations considered by him and thus entitled to some deference by this Court. The federal regulatory structure simply does not lend credence to the speculative fears set forth in the Government's brief.

III.

We have dealt with the constitutional deficiencies of the new federal "advance notice" requirement, H.E.W. Handbook, Pt. IV, §2300(d)(5), in our discussions of the California and New York City pre-termination procedures.

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construction or constitutional validity are not appropriate for agency determination and are best settled by resort to the judicial process. Cf. *Oestereich* v. *Selective Service Local Bd. No. 11*, 393 U.S. 233, 239 (1968) (Harlan, J. concurring). The issue raised by Mrs. Guzman in *Goldberg* was to the *applicability* of agency policy in her case, *Goldberg*, Br. of Appellees 68, n. 81, and the "inadvertence" noted by the Government was its own, and not the district court's.

[10] See note 4 *supra*, p. 4.

Wheeler, Br. for Appellants 14-23; *Goldberg*, Br. for Appellees 48-50. Several points, however, require clarification. Since both the California and New York City procedures fully comply with this Handbook provision, it is clear that "advance notice of questions" is satisfied by California's and New York's written forms, and the recipient's "opportunity to discuss his situation" before termination is satisfied by New York City's letter of protest procedure. See Reply App. 7a.[11] "Advance notice *of questions*" and the required discussion, an addition to H.E.W.'s detailed pre-existing code governing caseworker investigation of eligibility, H.E.W. Handbook, Pt. IV, §2000, *et seq.*, may occur at any point during the investigation process, not necessarily after investigation, and the procedure does not require a review by a relatively uninvolved official of the caseworker's reasons for termination. As the Government states,

> "It is merely a method of providing notice and screening out those cases which can be resolved by informal procedures." Gov. Br. 13.[12]

Nonetheless, the Government urges that this procedure is a "substantial modification" of prior practice since, the Government continues, formerly local agencies

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[11] Notice need be no more advance than California's three days, though one function of the federal requirement is said to be to eliminate the "element of surprise." Gov. Br. 12.

[12] The California procedure makes clear that it contemplates a discussion between line worker and recipient of eligibility questions and not a review of the reasons for termination. "The opportunity to meet" under the California procedure is "to discuss the entire matter informally for purposes of clarification and, *where possible, resolution.*" Calif. Social Services Manual, Section 44-325.43 [emphasis added]. The New York City procedure goes somewhat beyond this, but the review it offers is predicated on the case record and a possible letter of protest from the recipient.

> "were not required to inform recipients that an investigation or evaluation was underway or to permit them to participate in the process leading to this initial decision." Gov. Br. 10.

This description of prior practice is irreconcilable with a plethora of H.E.W. regulations antedating Section 2300 (d)(5) which mandate in great detail the eligibility information to be provided recipients and their participation in all redeterminations of eligibility (including the special investigations upon report as well as the periodic recertifications).

"At least one" personal interview with the recipient has long been required for all such eligibility investigations and redeterminations. H.E.W. Handbook, Pt. IV, §§2220(5)(b), 2230(5)(c) (March 18, 1966) [now Sections 2200(e)(2), 2300(e)(3)].[13] The Handbook also required that:

> "Applicants and recipients will be relied upon as the primary source of information about their eligibility." Section 2220(5)(a) (March 18, 1966) [now Section 2200(e)(1)].[14]

H.E.W. interpreted this to require the local agency to explain to the recipient what questions remained to be solved,

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[13] We are without access to the regulations of the Department of Health, Education and Welfare prior to March 1966. The substance of the regulations requiring recipient involvement in eligibility determinations certainly predates 1966, however.

[14] The Handbook explains that determinations of eligibility (including, of course, redeterminations) "are based on recognition of the rights and obligations of applicants and recipients to be responsible participants in the process." H.E.W. Handbook, Pt. IV, §2230(5) (March 18, 1966) [now Section 2300(e)(1)].

how *he* can resolve them, and the necessity for resolution.[15] H.E.W. Handbook, Pt. IV, §2230(5)(a) (March 18, 1966) [now Section 2300(e)(5)]. Obviously it has always been understood that client assistance will be sought to dissipate questions of possible ineligibility. Indeed, the agency was obligated "to help [recipients] provide needed information." H.E.W. Handbook, Pt. IV, §2220(5)(a) (March 18, 1966) [now Section 2200(e)(2)]. The role of the recipient was underlined by the requirement that he agree to *all* steps taken by the agency in its investigation of continued eligibility, including contact with third parties who might be in possession of relevant information. H.E.W. Handbook, Pt. IV, §2230(5)(e) (March 18, 1966) [now Section 2300(e)(2)].[16] Where, on the basis of all available information, the agency determined that the requirements for continued eligibility were not satisfied, it was under a duty to notify the recipient of such a determination in writing, and include therein "the reason why he has been determined to be ineligible"; the express purpose of notice was to enable the aggrieved recipient "to express dissatisfaction with the agency action." H.E.W. Handbook, Pt. IV, §2230(5)(d) (March 18, 1966) [now Section 2300(f)].

These requirements certainly are not evidence of the secret process without notice which the Government would have us believe Section 2300(d)(5) was intended to elimi-

[15] "If the individual is reluctant or unwilling to help resolve the question . . . the agency is responsible for considering carefully with him his reasons." H.E.W. Handbook, Pt. IV, §2230(5)(a) (March 18, 1966).

[16] Recipients were to be afforded a "clear interpretation of what information is desired, why it is needed, and how it will be used" before consent is sought to secure information from collateral sources. H.E.W. Handbook, Pt. IV, §2230(5)(c) (March 18, 1966) [now Section 2300(e)(2)].

nate. Except, therefore, as additional exhortation in this prolix code, it is difficult to discern what mandatory change is worked by Section 2300(d)(5). Whatever its purpose, the Section does not represent an experiment requiring substantial modification of prior state practice or necessitating time to adequately assess its effectiveness. See Gov. Br. 16. Pervasive personal contacts between caseworker and client in eligibility redetermination, and an opportunity to discuss eligibility questions with the caseworker have been the rule, not the exception, in welfare administration.[17]

IV.

The Government does not dispute that due process guarantees "against governmental capriciousness and arbitrariness" apply to the distribution of public assistance benefits. Gov. Br. 19-20. But it would justify summary procedure for revocation of such benefits on the legal principle that they are not "property (in the classic sense)," Gov. Br. 29, that they are less "tangible" than OASDI (Social Security) benefits, Gov. Br. 22, and that the interests of eligible recipients in retention of them is "more tentative" than one's interest in "property," Gov. Br. 27. These opaque legalisms will be recognized as variations on the

[17] At least since 1963 New York State has mandated that "in cases where there is indication of changes in need or resources" personal contacts with the recipient "as needed in excess of the minimum . . . shall be made." 18 N.Y.C.R.R. §351.22. The minimum referred to in the case of Home Relief and AFDC clients is once every three months. 18 N.Y.C.R.R. §82.1. The State regulations contemplate the possibility of additional personal contacts even in the case of *periodic* redeterminations (which in the case of Home Relief and AFDC recipients must be made every six months). 18 N.Y.C.R.R. §351.23(a), (b). Also, see, *Goldberg*, Br. for Appellees 33-37, 49-50.

theme of rights and privileges and invocation of the doctrine that the latter are not entitled to traditional constitutional safeguards against revocation. The inappropriateness of this dichotomy, particularly in a benefit program which sought "to introduce . . . a government of laws," Gov. Br. 21, is argued in the principal briefs. *Goldberg,* Br. of Appellees 12-13; *Goldberg,* Br. of Institute 10-17.

But the factors relied on by the Government to classify interests as worthy or unworthy of procedural protection under this dichotomy well reveal its irrelevancy in determining the procedural requirements of due process. The comparison with OASDI is illustrative. Under the right-privilege approach, the controlling difference is found in the financing of OASDI through a trust fund and public assistance through annual congressional appropriations. How the mechanics of financing bears upon the impact and character of the administrative decision, the nature of the individual and governmental interests, the decision-making process or "the type of proceeding involved," *Hannah* v. *Larche,* 363 U.S. 420, 440 (1960), is not explained. There are critical differences between OASDI and public assistance which bear directly upon the procedures that are due, as H.E.W. has itself recognized,[18] but the right-privilege dichotomy simply forecloses inquiry into them.[19]

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[18] The Government's assertion that it would be inconsistent to require prior hearings in the case of AFDC terminations when they are not available in the case of OASDI is curious in view of the contrary position taken by H.E.W., the agency charged with administering both programs. Federal financial participation is now available to those states which choose to provide hearings prior to termination of assistance, H.E.W. Handbook, Pt. IV, §6500(b), and, effective July 1, 1970, all states will be required to do so. 45 C.F.R. §205.10.

[19] As the Government said below, "[t]he OASDI program is not involved in this litigation." Reply App. 2a. Accordingly, the

We do not assert a due process right to a prior hearing in all circumstances of governmental action. Where the question is essentially who is to hold property or benefits pending adjudication, the requirements of due process may vary. But that is not the question we face in welfare programs, the last line of public defense against severe privation. Where welfare aid is erroneously and arbitrarily withdrawn before an opportunity to contest the decision, what is at stake is the brute fact of survival and indeed

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administration of that program, its actual procedures, and the impact of suspension or termination have not been explored in these cases. Some observations about the differences can be made, however.

Eligibility for OASDI is not based on need and beneficiaries can and usually do have resources and other sources of income. *Social Security Programs in the United States*, 20-21, U.S. Dept. of Health, Education and Welfare, Social Security Administration, March 1968. Eligibility is based on objectively verifiable criteria (age, death, family relationship and disability), 42 U.S.C. §§402, 432(c), and once established, is not subject to continuous redetermination. There are no caseworkers in OASDI. Far fewer events affect payment in OASDI than AFDC or OAA, and most all of them are objectively ascertainable and verifiable (*e.g.*, income subject to withholding, 42 U.S.C. §403(b)). The vast majority of terminations or suspensions are based on changes reported by the beneficiary himself. In some circumstances, payments may continue for a specified time beyond the date eligibility is found to cease. Public assistance under the federal programs is available to most OASDI beneficiaries.

Social Security benefits may in some circumstances be suspended upon an administrative finding that there is a danger of overpayment, after notice and a conference between an agency official and a beneficiary. Upon suspension, the beneficiary may request expedited payment or reinstatement upon alleging reasons why he is entitled to the payment. 42 U.S.C. §405(g) and 20 C.F.R. §404.968(a). He may also request reconsideration of the suspension, 20 C.F.R. §404.910. The beneficiary is also entitled to a prompt hearing before a Social Security hearing officer and an appeal to the Social Security administrative appeals counsel. He is then entitled to further review in the United States District Court. The hearing process in OASDI, with judicial review, is not unused. See generally Reply App. 11a-15a.

any effective opportunity to contest the determination. As we have seen in the instant cases, the interim hardships are incalculable and a subsequent hearing largely illusory. Indeed the Government observes that "[w]hile a substantial proportion of 'fair hearings' have in the past led to reversal or modification of adverse agency determinations, only a small proportion of terminations result in requests for hearings." Gov. Br. 30, n. 12. In light of the interim harms and the subsidized dilatoriness of the very subsequent "fair hearing," this is not a case of flexibility of timing. The issue really is the availability and effectiveness of any opportunity to be heard. See *Goldberg,* Br. of Appellees 58-61.

When the due process question is measured in these terms, the necessity of maintaining assistance until a hearing is apparent. We believe this Court recognized in *Snaidach* v. *Family Finance Corp.,* 395 U.S. 337 (1969), the relevancy of the significance of the "property" to the individual about to be deprived of its enjoyment. The invalidation of ancient garnishment procedures was based on the impact of summary process as applied to wages, "a specialized type of property presenting distinct problems." 395 U.S. at 430. The Court noted that summary process "might well drive a wage-earning family to the wall." 395 U.S. at 341-42. This decision, we believe, reflected a line of cases in this Court requiring a high degree of procedural fairness where an adjudicatory determination threatens a shattering impact on an individual.[20] *Garfield* v. *Goldsby,*

[20] The Government's distinction between benefits without cost to the Government, such as broadcasting licenses, and Government revenues is equally unhelpful in determining whether there is an "extraordinary situation" warranting summary process. The Government's interest in the proper use and allocation of such publicly

211 U.S. 249 (1908); *Ng Fung Ho* v. *White*, 259 U.S. 276 (1922); *Willner* v. *Comm. on Character and Fitness*, 373 U.S. 96 (1963).

V.

There is also no merit in the argument that summary revocation can be justified as a means of accurately allocating and limiting discretionary expenditures in the interest of all welfare recipients. While no stranger to defenses of welfare practices, *King* v. *Smith, supra; Shapiro* v. *Thompson*, 394 U.S. 618 (1969), this justification is particularly indefensible here in light of the very allocating function of a fair hearing and the total lack of evidence or argument to support the spectre of abuse.

We first must observe that the existing welfare system cannot claim accuracy in allocating aid as one of its virtues; the inaccuracies weigh heavily on the side of underpayment and arbitrary revocation. *Goldberg*, Br. of Appellees 38-39, 57; Gov. Br. 30-31. The arbitrary, indeed cavalier, revocations of aid documented in the instant cases are

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owned resources as the limited number of broadcasting channels or air traffic routes is certainly no less than its interest in public revenues. And these resources are certainly not property in any classic sense. See, *Blumenthal* v. *F.C.C.*, 318 F. 2d 276 (D.C. Cir. 1963). But that hardly tells us when, if ever, the Government may summarily seize a broadcasting license or an air traffic route. The constitutional question would not be changed if the Government issued licenses to the highest bidder, thereby involving "public revenues" as well as public resources. Cf. *Gonzalez* v. *Freeman*, 334 F. 2d 570 (D.C. Cir. 1964). The "extraordinary situation" represented by *Phillips* v. *Commissioner*, 283 U.S. 589, does not support summary process in any situation affecting "public revenues." Largely based on history, this extraordinary situation refers to the prompt collection of a tax, where payment is in jeopardy and not revocation of statutory benefits. See generally, Reich, The New Property, 73 Yale L. J. 733 (1964).

not speculative; the denial of an effective hearing is not calculated to diminish this pattern of administrative arbitrariness. Speculative focus on the so-called "ineligible individual" must not obscure the documented and deeply embedded characteristics of the present system. Nor should the welter of statistics obscure the individuals and families in the instant cases, and the many others similarly situated, victims of the welfare system's long emphasis on saving money. They do not see the relaxation of constitutional safeguards as somehow in the interests of all or any welfare recipients.

Against the reality of these "thousands of personal tragedies behind the statistics of public assistance," as the City of New York puts it, *Goldberg*, Br. of Appellants 11, we have a speculative cost argument that finds no support in the regulatory view of H.E.W. or the view of New York State, which does not join the City in this appeal.[21] Nor, upon examination, is the speculation well founded.

The additional expenditures of a prior hearing are not delineated by the number of persons receiving public assistance, though all have a stake in the outcome of this case. Nor is it relevant that some welfare recipients, about 2% in all, have joined together to deal with grievances

[21] Other courts, familiar with the factors of local welfare administration, have reached a similar conclusion to that of the three-judge district court in *Goldberg* v. *Kelly*. *Machado* v. *Hackney*, 299 F. Supp. 644 (W.D. Texas 1969) (three-judge court); *Sims* v. *Juras*, Civ. No. 69-238 (D. Ore. August 21, 1969) (three-judge court); *Robertson* v. *Born*, Civ. No. 51364 (N.D. Calif. June 12, 1969); *Bailey* v. *Engleman*, Civ. No. 654-69 (D.N.J. Sept. 22, 1969); *Miller* v. *Zoeller*, Civ. No. 69-C-2 (W.D. Wisc. Jan. 20, 1969) (temporary restraining order); *Coleman* v. *Ott*, Civ. No. 68-1169-C (D. Mass. Jan. 1969) (stipulation of dismissal on condition that state adopt prior hearing procedure as outlined by the district court in *Goldberg* v. *Kelly*).

collectively. They do not petition for a joint or mass termination hearing, and denial of a specific grant or indeed adjustment of assistance is not comparable to withdrawal of a bi-weekly subsistence grant. It is also incorrect to infer the burdens from the gross number of cases terminated. By hypothesis, we deal here with *contested* initial decisions to withdraw aid, where the recipient, previously found eligible, sufficiently believes that circumstances have not changed to contest the caseworker's assessment in a hearing.

Experience in states affording a prior hearing before cutoff leaves no doubt that the number of persons who do pursue the hearing is limited, indeed disturbingly so in light of recognized rates of erroneous terminations. New York City is assuredly illustrative, with the largest number of AFDC recipients in the country, a recipient population relatively more aware of their legal rights, and with greater access to legal assistance, an excess of administrative problems and errors, and a high rate of terminations monthly. The overall figures indicate that from January 20, 1969 to May 30, 1969, 1014[22] persons out of over 60,000[23] terminations requested a prior hearing, and that approximately 51 percent of these persons prevailed in that hearing. Indeed this reversal rate would pass muster even under the Government's test of whether more "eligible" than "ineligible" persons request a hearing. The experience in California, Washington, D.C., and Massachusetts is not to the contrary.

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[22] New York City Department of Social Services, Review Section Reports for Quarter Ending March 31, 1969, and Months Ending April 30, 1969 and May 31, 1969.

[23] New York City Department of Social Services Monthly Statistical Report, May 1969, p. 10.

Nor is Mississippi, the Government's chosen state, an exception to this experience. The so-called "200 per cent" increase in requests for termination hearings in 1968-1969 arises against the virtual non-use of the delayed hearing after termination (97 out of 22,776 terminations in 1967-68).[24] And the reference to the "77 per cent" "ineligible" persons requesting pre-termination hearings in Mississippi ignores the 46 requests (out of the 288 prior hearings in one year) "withdrawn" prior to the hearing, which almost always occurs upon reinstatement by the local agency. It also ignores the recent findings of the United States Commission on Civil Rights on welfare administration in that state:

> "When a hearing is finally granted, there is no assurance it will be fair. . . . The local decision is often assumed correct."[25]

The report concludes that

> "Despite the Social Security Act principle that eligible persons have a 'right to aid' and to a 'rule of law,' the Mississippi welfare system ignores this in practice."[26]

The argument then comes down to assertion, and indeed an assertion that we are to accept for many years, until the refuting experience is certain. Gov. Br. 27. It will readily be appreciated that the assertion is ultimately founded on the premise of distrust too long characteristic

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[24] Mississippi Department of Welfare, Division of Statistics.

[25] Welfare in Mississippi, A Report of the Mississippi State Advisory Committee to the United States Commission on Civil Rights 66 (February 1969).

[26] *Id.* at 81-82.

of welfare administration. As the Government openly puts it, "if payments are continued pending 'fair hearing' there will be more requests for such hearings, and more payments will be made to ineligible individuals." Gov. Br. 26-27. We have already argued that this premise is both unfounded and impermissible where, as here, it results in the denial of any effective opportunity to be heard. *Goldberg*, Br. of Appellees 56-61.

We stress here only that welfare agencies, rather more than most, possess ample authority and flexibility both to deal with abuses and to minimize the costs and inconveniences of fair process. Civil remedies in the form of recovery provisions for overpayments frequently are invoked[27] (and valid terminations are usually based on resources or income). Criminal sanctions exist and are used for misrepresentation of eligibility and knowing improper retention of benefits. The nature of eligibility disputes, being limited to a single issue or two, and a highly localized system of administration allows unusual expedition in the scheduling and holding of a welfare hearing. The pattern of 3-6 month delays, sometimes longer, in the post-termination "fair hearing" process cannot be explained by the practicalities of administration, as can be seen in the revised two week pattern in those states now continuing aid pending a hearing.[28] Although the welfare system is not

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[27] See Graham, Public Assistance: The Right to Receive; The Obligation to Repay, 43 N.Y.U.L. Rev. 451 (1968).

[28] Mississippi, Manual Sec. F., pp. 6101-6103 (fair hearing, 20 days); Washington, D.C., Handbook of Public Assistance Policies and Procedures (HPA-II) BR 1.1, III, Sec. 17 (fair hearing, 15 days); New York State, Letter of Commissioner, Department of Social Services, to Local Commissioners, *Goldberg*, Br. of Appellees 92 at 95 (local agency hearing, two weeks); New York City Department of Social Services, Procedure No. 69-7 (January 15, 1969) I(4)(a) (14 days).

known for the exercise of flexibility, the flexibility assuredly is there, and the minimal guarantees of due process do not impose "fixed molds" precluding its exercise. The application of accepted norms of due process to welfare terminations does not impose costs or burdens in excess of those inherent in any system of Government that has sufficient regard for the rights of individuals to provide an opportunity to be heard in making adjudicatory decisions affecting their vital interests.

In the final analysis, the Government's brief puts before this Court the questions posed by Professor Harry Jones over a decade ago in "The Rule of Law in the Welfare State," 58 Colum. L. Rev. 143, 156 (1958):

> "In an era when rights are mass produced, can the quality of their protection against arbitrary official action be as high as the quality of the protection afforded in the past to traditional legal rights less numerous and less widely dispersed among the members of society? . . . Is it beyond hope that this vast new company of officials can, in time, develop a tradition of decision worthy of being called, in Pound's fine phrase, an 'ethos of adjudication?' "

We submit the Government's answer to these questions is both untimely and incorrect.

CONCLUSION

The judgment of the District Court in No. 62, *Goldberg* v. *Kelly*, should be affirmed.[29] The judgment of the District Court in No. 14, *Wheeler* v. *Montgomery*, should be reversed.

Respectfully submitted,

LEE A. ALBERT
STEVEN J. COLE
NANCY DUFF LEVY
LUCY V. KATZ
Center on Social Welfare Policy and Law
401 West 117th Street
New York, New York 10027

Attorneys for Appellees in No. 62

MARTIN GARBUS
Roger Baldwin Foundation of the American Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

Attorney for Appellees in No. 62

[29] The Government's request that the judgment in No. 62 be affirmed with modification of the conditions appears to be inadvertent error. The Government provides no legal grounds in its brief to continue the preliminary injunction against the use of option (b), the New York City procedure, in either the AFDC or Home Relief Programs.

HAROLD J. ROTHWAX
DAVID DIAMOND
DAVID GILMAN
MARIANNE ROSENFIELD
PETER H. DARROW
STEVE WIZNER
MFY Legal Services, Inc.
320 East Third Street
New York, New York 10009

Attorneys for Appellees in No. 62

PETER E. SITKIN
STEVEN J. ANTLER
SIDNEY M. WOLINSKY
CHARLES STEPHEN RALSTON
1095 Market Street
San Francisco, Calif. 94103

Attorneys for Appellants in No. 14

EDWARD V. SPARER
MICHAEL S. ZOLA
WINTON D. WOODS, JR.
Of Counsel

REPLY APPENDIX

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

68 Civ. 394

68 Civ. 864

JOHN KELLY, *et al.*,

Plaintiffs,

—v.—

GEORGE K. WYMAN, *et al.*,

Defendants.

BRIEF OF THE UNITED STATES AMICUS CURIAE

Introduction

This brief is filed by the United States in response to the court's request. It describes certain Federal policies and procedures applicable to the Federal-State program of Aid to Families with Dependent Children (AFDC), Title IV, part A of the Social Security Act, 42 USC 601-609, and those followed in the Federally-administered program of Old-Age, Survivors, and Disability Insurance (OASDI), Title II of the Social Security Act, 42 USC 401 et seq.

No attempt is made to argue or discuss on the merits the constitutional or other issues which are raised by this case. Rather, this brief sets forth certain relevant Federal policies and how they operate, together with an explanation of some of the factors which the Federal agency must take

into account in the development and application of these policies.

In responding to the court's request, we have placed emphasis on furnishing information and clarification. We have not undertaken to discuss in any detail the authority or legal rationale for the various Federal policies. The OASDI program is not involved in this litigation. As for the AFDC program, whether the plaintiff-clients or the defendant-State and local agencies should prevail in this case, it appears, as will be discussed below, that there will be no violation of Federal requirements.

I. *Title IV, part A, of the Social Security Act (AFDC)*

Title IV, part A, of the Social Security Act contains the statutory authorization for the Federally-assisted AFDC program, which is administered by the States and localities. Under this title, as is the case in the other public assistance programs, the Secretary is responsible for determining whether State plans submitted conform to the requirements of the Social Security Act and the Federal policies adopted pursuant to the statute to carry out those requirements.

These implementing policies, which are presently found in the Federally-issued Handbook of Public Assistance Administration (hereinafter cited as HB), reflect the Federal agency's interpretation of the specific provisions, construed in light of the broad purposes, of Title IV, part A, of the Social Security Act. The Federal policies pertaining to State agency procedures such as the prior notice and fair hearing requirements involved in the present litigation, set forth the minimum standards necessary for an approvable State plan. States are free, insofar as their relationship with the Department of Health, Education, and Welfare is concerned, to adopt additional or more elaborate procedures than the Federal basic requirements.

In addition, Federal matching policies are often broader than Federal requirements. Thus, under Handbook Transmittal No. 140, States are not required to continue assistance pending a fair hearing decision, but if a State does continue assistance, Federal matching would be available for all the attendant expenditures by the State agency in accordance with the usual rates described below.

In general, no question would be raised by the Federal administrative agency should a State do more than the minimum Federal requirements, and Federal matching could be claimed for the additional related expenditures. Therefore, because there would likely be no conflict with Federal plan requirements and no loss of Federal funds regardless of what decision this court might reach on the merits of the litigation, we have not deemed it either appropriate or necessary to include legal argument on those issues. For the reasons stated above, it does not appear that the validity of the Federal policies under either the Federal statute or the constitution is in issue here.

The Statute

Section 602 of 42 USC contains three provisions in particular which are relevant to the claims of those plaintiffs in the above-captioned litigation who have been receiving AFDC. In order to be approved by the Secretary, and hence be eligible for Federal matching, the State plan must

> "provide, effective July 1, 1951, that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals;" § 602(a)(10),

"provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for aid to families with dependent children is denied or is not acted upon with reasonable promptness;" § 602(a)(4), and

"provide . . . such methods of administration . . . as are found by the Secretary to be necessary for the proper and efficient operation of the plan . . . " 42 USC § 602(a)(5)(A).

The Federal Policy

(a) *Application, Determination of Eligibility and Furnishing Assistance*

Under the policies applicable to a Federally-assisted AFDC program, once the State welfare agency has found an individual (or, as is more common in AFDC, the family unit) eligible for a cash assistance payment, these payments must continue until there has been an agency determination that the individual is no longer eligible for assistance or, although not totally ineligible, should receive a lesser amount of assistance. The agency may not cease or reduce payment while investigating a family's current situation or evaluating information it may have received which appears to raise a question about continuing eligibility. HB, Part IV, § 2200(b)(4). Thus, until the agency has completed any redetermination it may make, has considered all the relevant available information, and has made a definite determination of ineligibility, or change in amount of assistance needed, payments must continue as before.

Effective July 1, 1968, as part of the required procedure, should any question arise concerning change in the family's circumstances, the State agency

"gives advance notice of questions it has about an individual's eligibility so that a recipient has an opportunity to discuss his situation before receiving formal written notice of reduction in payment or termination of assistance." HB, Part IV, § 2300(d)(5).

This procedure is designed to serve several purposes. First, it is intended to give the individual a chance to bring new or additional facts to the agency's attention; thus, he may be able to show, prior to any more formal action, that his situation has not actually changed as believed by the agency. Where this can be accomplished, termination (or reduction) of assistance is avoided, with benefit to both the individual who does not have his usual payments interrupted, and to the agency which will be spared the expense and staff time involved in an unnecessary hearing.

Even in cases which would not be contested by the individual, the advance notice provides him with time to prepare for the change which the reduction or termination of assistance will have on his financial situation. This policy seeks to avoid a situation in which a person is caught completely by surprise with a notice that he will no longer receive any assistance or will receive a lesser amount than formerly.

It should be made clear at this point that the prior notice procedure described above, as required by the Federal policies, is not intended to constitute the "fair hearing" required by the Federal statute, and which will be discussed separately below. The formalities of the fair hearing process are not required at this stage, although a State would certainly be free to add safeguards to this adjustment procedure which go beyond the minimum Federal requirement. This informal process gives notice, and per-

mits an exchange of information before the actual determination is made by the State agency, and as stated above, since this takes place before the agency has made the determination to reduce or terminate assistance, payments must continue without interruption or reduction throughout this time period.

This procedure also operates to "sort out" those cases which will proceed to the fair hearing. Clearly, every recipient has a right to a fair hearing if he is not satisfied with the determination made by the agency in his case; however, it is hoped that this preliminary process will resolve many of the disputes and thus satisfy the recipient. This procedure is also intended to be expeditious. Therefore, the Federal agency expects that the time from which notice is given to the recipient of questions about his eligibility, through agency consideration of any information which is brought to its attention, until the time the agency notifies the individual of its final decision, will not exceed 30 days. The policies on Federal financial participation set an outer limit of 30 days on the time period for which Federal matching may be claimed in assistance payments continued during the notice and adjustment process.

Federal financial participation may be claimed for all the expenditures which the State agency incurs in connection with the prior notice and adjustment procedure described above. The Federal agency will pay 50% of the administrative costs and also participate in the assistance payments made to the individual throughout this 30-day period in accordance with the usual formula (which, for assistance payments under the New York program, is also 50%). (HB, Part IV, § 5514(2)(c) (as revised)).

The procedure which New York has adopted in response to the Handbook policy on prior notice and which is in issue

in the present litigation satisfies the basic objectives of that Federal requirement. While New York has allowed for variations in procedures under its two options, they both meet the purposes for which this requirement was designed, namely the giving of advance notice to the recipient before action is taken by the agency, and the availability of a mechanism whereby information may be presented, and adjustment is possible.

Plaintiffs, in their Brief in Opposition to Defendants' Motion for Summary Judgment, question whether the New York procedure meets the Federal requirement that the State plan "be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them." 42 USC 602(a)(1). While it is certainly true that this provision means that there must be a uniform program in effect throughout the State, the Department of Health, Education, and Welfare does not interpret this section of the statute to require absolutely identical procedures in every political subdivision. Rather, this subsection is satisfied if the procedures everywhere in the State meet the fundamental purposes to which the Federal policy is directed. In some instances, the Department of Health, Education, and Welfare may determine that there is only one possible procedure, or that certain components are essential (or, even, unacceptable), in order to carry out its purposes. However, in the present case, both options which the New York State agency allows provide prior notice and an adjustment procedure, and thus, the possible differences in other details do not raise a question of the uniformity of the program.

The Department of Health, Education, and Welfare has approved the New York regulation, but is nevertheless seeking clarification on one point. The Federal policy on prior notice and adjustment is mandatory with respect to both

contemplated terminations and reductions of assistance. The New York regulation only expressly refers to the former situation. Therefore, it is necessary to seek confirmation from the New York agency to assure that its procedures on prior notice and adjustment are equally applicable to proposed reductions in the assistance payment.

(b) *The Fair Hearing*

As stated above, the Federal statute requires the State agency to provide an opportunity for a fair hearing to anyone whose claim for assistance is denied, or is not acted upon with reasonable promptness. This has been interpreted by the Department of Health, Education, and Welfare to require the same fair hearing in connection with termination of assistance or reduction in the amount of assistance and, indeed, such a hearing may also be required in connection with various other decisions which the agency makes affecting the AFDC family. See, generally, HB, Part IV, § 6200 et seq.

The Federal policies contemplate, in any termination or reduction of assistance, that the welfare agency will give formal written notification of the action to the client (after use of the prior notice and adjustment procedure discussed above). At this point, the client has a right to a fair hearing. In New York, as in other jurisdictions where there is local administration, the distinction between these two procedures is clearcut. The locality (New York City) gives the recipient advance notice and an opportunity to provide additional information. After considering the information, if any, that may be presented, the locality makes its formal determination and informs the recipient in writing. The recipient may then request a fair hearing before the State agency.

Under the current policies in the Handbook, continuation of assistance pending the fair hearing decision is not required.[1] However, should the State welfare agency choose to continue such payments, with no recovery or adjustment should the hearing decision be in favor of the agency, or should this court rule that continuation is required, such a practice would be completely consistent with Federal rules, and Federal financial participation may be claimed for the assistance payments made during this period. HB, Part IV, § 6500(b). Matching will be available in accordance with the usual 50% rate (for New York) for assistance payments.

In February, 1968, the Department of Health, Education, and Welfare notified all States that, effective July 1, 1968, payments of assistance retroactive to the date of the incorrect agency action must be made in those cases where the decision of the State agency following the fair hearing is favorable to the claimant (HB, Part IV, § 6200 (k)), and Federal financial participation may be claimed for such retroactive assistance payments. HB, Part IV, § 6500 (a). This requirement applies to hearing decisions after June 30, 1968 and means that retroactive payments must be made back to the date of the incorrect agency action or July 1, 1968, whichever is later. If the incorrect action was earlier than July 1, 1968 and the State chooses to make retroactive payments for the full period, Federal financial participation is available for the payments back to the date of the incorrect action.

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[1] The Department of Health, Education and Welfare has decided to adopt a policy requiring states to continue assistance in certain classes of cases until a decision is rendered in the fair hearing proceeding. Although no formal statement of this contemplated policy has been issued, distinction between classes of cases along the lines suggested at pages 8-10 of Judge Bryan's Memorandum convening a three-judge court in this matter is being considered.

In addition, the States were notified at the same time of several other new policies, some pertaining to the increased availability of Federal matching and others setting forth new plan requirements in the area of fair hearings. The new Federal requirements became effective July 1, 1968 and New York submitted implementing plan material. However, the State was notified that its plan amendment was not acceptable in several areas. In particular, the plan amendment was deficient with respect to its provision for (1) detailing of the circumstances under which an individual could obtain a fair hearing, (2) informing the local agencies of fair hearing decisions and assuring that such decisions will be treated as precedents by the State and local agencies and will be made available to claimants and their representatives and the general public for their precedential value, (3) providing an impartial medical assissment at agency expense when medical issues are involved in the hearing, (4) making retroactive payments where the fair hearing decision of the State agency is favorable to the claimant, and (5) specifically providing that the hearing officer's decision must be based only upon evidence which is a part of the record.

Because of the pendency of these questions, no action on the plan amendment has been taken by the Federal administrative agency. It is their understanding that New York is in the process of preparing revised material to fully comply with the Federal requirements and will then submit the revision for formal Federal approval. While the New York plan, as currently approved, does not at this moment fully meet the Federal requirements regarding fair hearings, no question of continuation of Federal funds has been raised, in view of the continuing negotiations between the Federal and State agencies. Federal funds of course, are

not withdrawn unless there has been formal disapproval of a State plan and the State has been given notice and opportunity for hearing.

As this court is aware, the question of whether a State welfare agency is required under the due process clause of the Fourteenth Amendment or any other generally applicable principle of law, to continue assistance pending the fair hearing decision, is one which is currently the subject of litigation in various other jurisdictions.[2]

II. *Title II of the Social Security Act (OASDI)*

Termination and Suspension of OASDI Benefits

1. The entitlement of an individual to an OASDI benefit depends on meeting stated statutory conditions. Once established, the individual's entitlement to the benefit continues until the occurrence of specified termination events. Upon the occurrence of such an event, the benefits are terminated as of the close of the month preceding the month in which the event occurred. In disability benefit cases, however, the benefits are terminated as of the close of the second month following the month in which the disability ceased; or, in cases in which benefits are terminated because the individual returned to work, the termination is effective as of the close of his "trial work period" which can be as late as the eleventh month following the month he returns to work.

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[2] In addition to the cases cited on page 10 of Judge Bryan's memorandum opinion in this matter, we understand that these suits have been filed in Federal district courts: *Machado* v. *Hackney*, C.A. No. 68-108-SA (W.D. Tex.); *Sprayberry* v. *Dulaney*, C.A. No. (M.D. Ga.); *Van Blaricum* v. *Department of Public Welfare*, C.A. No. 68-78 (S.D. Ohio).

2. Between the date as of which entitlement to the benefits is established and the occurrence of an event calling for the termination of the benefit, other statutorily prescribed events may occur that require the suspension or nonpayment of the benefit (as distinguished from terminating entitlement to the benefit) for one or more months. These events are principally:

a. Earnings by a beneficiary over and above an amount prescribed by the statute;

b. Work outside the United States by a beneficiary for a period of time specified by the law;

c. Residence by an alien beneficiary outside the United States;

d. Court-ordered suspension upon conviction for subversive activities;

e. Refusal of vocational rehabilitation services by a disability insurance beneficiary;

f. No entitled child in a mother's care;

g. Deportation of the beneficiary;

h. Receipt by a disability insurance beneficiary of periodic workmen's compensation payments; and

i. The performance of substantial gainful activity by an occupationally blind disability insurance beneficiary.

3. The determination of the Social Security Administration to terminate a benefit because of the occurrence of a specified terminating event or to suspend the payment of a benefit for one or more months because of the occurrence of a suspension event, is based in the vast majority of cases on a report of the occurrence of the event by the bene-

ficiary. The determination to terminate a benefit or to suspend its payment for one or more months may be made also on information obtained by the Administration from other sources. Before this is done, however, the beneficiary is usually contacted by the Social Security Administration and asked to submit a report relative thereto which often furnishes also necessary data on which to base a termination or suspension and on which the termination or suspension determination is then made. The greatest number of these suspensions by far are based on reports of current wages from employment or of self-employment income derived by beneficiaries in amounts in excess of those they may earn or derive under the statute and still receive their benefits.

In every case in which a benefit is terminated or suspended, whether the action is taken pursuant to the report from the beneficiary or on information obtained from other sources, the individual affected is notified in writing of the determination and is advised of his rights to further administrative and court review of the determination.

Under the regulations of the Social Security Administration adopted pursuant to section 205(b) of the Social Security Act, the determination of the Administration to terminate or suspend a benefit is a "final decision" if the beneficiary fails to seek its reconsideration by the Administration, 20 CFR 404.908, and each successive administrative decision likewise is, in turn, a "final decision" unless further administrative review is sought, as provided by the regulations, 20 CFR 404.916, 404.940, 404.951, or if after all such administrative review has been had, the beneficiary does not seek court review as provided by section 205(g) of the Act.

Benefits are not certified by the Administration for payment to a beneficiary from and after the effective date of

the initial determination terminating or suspending payment of a benefit unless it is reversed on further administrative review or by a court on court review. Upon reversal, the benefit is certified for payment retroactively to the date as of which it was terminated or suspended.

4. The certification of benefits for payment may be withheld also while the Administration, on the basis of information it has received, is conducting an investigation to determine whether or not it should terminate the benefit or suspend its payment for one or more months. This, as the Social Security Administration Claims Manual states, may be done, however, "only where it appears probable that payments will eventually have to be suspended or terminated," and may continue, it is further stated in the Manual, merely "as long as necessary to offset the probable overpayment." Claims Manual section 5036, paragraph 1. Social Security district offices and reviewing offices are enjoined, too, to give high priority to such investigations, to complete them promptly and to determine as quickly as possible whether or not benefits should be terminated or suspended. Claims Manual section 5036, paragraph 2.

There are some instances also in which payment may be withheld for administrative reasons not related to the right to payment but to what might be termed the "technique of payment." This occurs where the Administration is notified by the Post Office Department or by others that the beneficiary has moved and left no forwarding address or where the appointment of a representative payee may be required. In these instances all past due benefits are, of course, certified for payments as soon as new proper address is obtained or a payee is appointed.

5. Section 203(h) of the Social Security Act expressly authorizes the Administration to withhold certifications of

payment pending investigation as to whether work deductions should be imposed. Sections 205(b) and (i) of the Act appear to authorize the Administration to withhold certifications of payment pending determination of whether or not to terminate or suspend certification for payment in other than work deduction instances.

Payments may be withheld pending development of the facts essential to a determination as is recognized by section 205(g) of the Act, authorizing the Administration, under stated conditions, to adopt "expedited benefit payment" procedures; by section 204 of the Act, specifying to whom unpaid benefits due a deceased beneficiary shall be paid; and by section 206 of the Act which provides for setting of attorneys' fees in Title II cases.[8]

III. *AFDC and OASDI Compared*

For purposes of drawing an analogy between the procedures followed by the Social Security Administration in operating its program of OASDI, and the Federal requirements pertaining to AFDC programs, it may be helpful to note some differences in the overall situations:

1. The kinds of situations or events which might give rise to termination or reduction of benefits are far fewer in OASDI than in public assistance, particularly AFDC. Also, most of the events affecting payment of OASDI tend to be more readily susceptible to objective ascertainment and hence less open to dispute than is often the case in the public assistance programs.

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[8] *Hopkins* v. *Cohen*, 390 U.S. 530 (1968) held that accrued benefits due a beneficiary and his family, to which they became entitled as the result of judicial review, provide the base for determining the attorney's fee.

2. In OASDI, the events which result in suspension or termination are often changes in circumstances which the beneficiary himself reports to the Social Security Administration; thus, the resultant action is generally expected and understood by the individual.

3. There is a much greater likelihood of change in the amount of a recipient's payment under AFDC, than there is in OASDI, or even in the other public assistance categories of the Social Security Act (Titles I, X, XIV, and XVI). If the recipient obtains temporary employment for a month, he will be eligible only for a reduced payment, or perhaps no payment at all; when the income ceases, the family will probably be eligible for the full amount previously paid. Support payments may be made by an absent father for a few months and then cease. The problem, therefore, of the proper procedures to be followed in AFDC is more difficult for both the recipient and for the State agency, than is the comparable situation in OASDI.

EDWIN L. WEISL, JR.,
Assistant Attorney General
Civil Division
Department of Justice

ROBERT M. MORGENTHAU,
United States Attorney for the
Southern District of New York,

For the United States of America.

LAURENCE VOGEL,
Assistant United States Attorney,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 14

MAE WHEELER, et al.,
Appellants,

vs.

JOHN MONTGOMERY, Director of the State Department of Social Welfare, and RONALD BORN, General Manager of the San Francisco City and County Department of Social Services,
Appellees.

On Appeal from the United States District Court for the Northern District of California

REPLY BRIEF FOR APPELLANTS

PETER E. SITKIN
STEVEN J. ANTLER
SIDNEY M. WOLINSKY
CHARLES STEPHEN RALSTON
1095 Market Street
San Francisco, California 94103
Telephone: (415) 626-3811
Attorneys for Appellants

EDWARD V. SPARER
MICHAEL S. ZOLA
WINTON D. WOODS JR.
Of Counsel.

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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On Appeal from the United States District Court for the Northern District of California

REPLY BRIEF FOR APPELLANTS

I

GIVEN THE INTEREST OF A WELFARE RECIPIENT FACED WITH THE LOSS OF HER MEANS OF SUBSISTENCE, A HEARING AFTER TERMINATION CANNOT JUSTIFY THE ABSENCE OF BASIC PROCEDURAL PROTECTIONS IN THE INFORMAL CONFERENCE.

There can be no dispute that for the vast majority of welfare recipients the termination of their subsistence grant will result in severe hardship and irreparable injury. Despite the fact that welfare recipients in California are allowed to maintain personal property reserves and still be

eligible for assistance it cannot be seriously contended that the statutory provisions ipso facto mean that recipients do, in reality, have such reserves.[1]

Statistics compiled by the California State Department of Social Welfare clearly show that most recipients have no personal property reserves at all. A study of the AFDC program (the largest public assistance program in California) indicates that as of July, 1966, two-thirds of all AFDC families had *no* personal property reserves and only 8% had personal property reserves in the form of liquid assets (cash and securities). The study also shows that of those with personal property reserves, two-thirds had property valued at less than $200. The average value of personal property of all families having such reserves was $163.55. [California State Department of Social Welfare, Division of Research and Statistics Reports dated June 5, 1967 and May 29, 1967. (Copies of these reports are set forth in their entirety in the Appendix to this brief at pp. 1a-2a.)]

Not only are most recipients devoid of any personal reserves to cushion the loss of their regular recurring welfare grants, but their grants are woefully inadequate to even meet their current ongoing needs.[2]

As the individual circumstances of Mrs. Wheeler demonstrate, the loss of a recurring welfare grant results in extreme hardship and great deprivation (A. 24). The fact

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1. Old Age Security recipients are permitted to retain personal property reserves up to $1,200, while AFDC families are allowed to retain up to 600. Cal. Welf. & Inst. C. §§11154 and 11257.

2. Statistics of the California State Department of Social Welfare indicate that average OAS grants as of June 30, 1968 were $101.91, average Aid to Blind grants were $135.23, average Aid to the Totally Disabled grants were $117.72 and average AFDC grants were $177.60 per family or $44.64 per individual AFDC recipient. A State superior court judge recently found that families forced to live on present welfare grants suffer irreparable injury, including malnutrition among children. *Ivy v. Montgomery*, Cal. Sup. Ct., S.F. Cty. No. 592705 (Sept. 11, 1969), Finding of Fact No. 45.

that retroactive payments can be awarded if aid is erroneously terminated is no answer to the injury which will result from such a termination. C.f. *Nash v. Florida Industrial Commission,* 389 U.S. 235 (1967) where this court recognized in an unemployment compensation case that:

> "Even the hope of a future award of back money may mean little to a man of modest means and heavy responsibilities faced with the immediate severance of sustaining funds." 389 U.S. at 239.

Severe injury would result even if post termination hearing decisions were rendered within sixty days from the date of request in compliance with HEW requirements. But, as appellees concede, California has failed to adhere to the federal time limits. (Appellees' Brief, p. 17, n. 26)[3]

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3. As of June 30, 1969, approximately 50% of the hearings pending before the State Department of Social Welfare had been pending for more than three months. SDSW, Division of Research and Statistics, draft Table 62 prepared for the as yet unpublished 1968-1969 Annual Statistical Report. This table was received by appellants' attorneys on October 4, 1969 from Wilbur Parker, Chief, Research and Statistics Division and is set forth below:

TABLE 62
APPEALS
Number Pending at the End of the Fiscal Years, by Elapsed Time from Date of Filing as of June 30, 1968, and June 30, 1969

Time elapsed from date of filing	Appeals pending			
	June 30, 1969		June 30, 1968	
	Number	Percent	Number	Percent
Total	2,487	100.0	2,169	100.0
Less than 1 month	327	13.1	284	13.1
1 to 3 months	596	24.1	652	30.1
3 to 6 months	423	17.0	746	34.4
6 to 9 months	274	11.0	244	11.2
9 to 12 months	180	7.2	121	5.6
1 to 2 years	229	9.2	96	4.4
More than 2 years	49	2.0	26	1.2
Pending Office of Administrative Procedure	409	16.4	—	—

When the interest of a welfare recipient in the continued receipt of her public assistance grant is analyzed in light of the realities of life on public assistance, can there be any doubt that the strictest forms of procedural protections are necessary before the right to receive assistance is withdrawn? Whether the right to receive assistance is viewed as a vested right,[4] statutory entitlement,[5] or mere privilege, the fact remains that a substantial private interest is at stake.

As a unanimous three judge court has recently stated in striking down a New York welfare statute as violative of the equal protection clause:

> "Receipt of welfare benefits may not at the present time constitute the exercise of a constitutional right. But among our Constitution's expressed purposes was the desire to 'insure domestic tranquility' and 'promote the general Welfare.' Emplicit in these phrases are certain basic concepts of humanity and decency. One of these, voiced as a goal in recent years by most responsible governmental leaders, both federal and state, is the desire to insure that indigent, unemployable citizens will at least have the bare minimums required for existence, without which our expressed fundamental constitutional rights and liberties frequently cannot be exercised and therefore become meaningless. Legislation with respect to welfare assistance, therefore, like that dealing with public education, access to public parks or playgrounds, or use of the mails, deals with a critical aspect of the personal lives of our citizens, whether such assistance be

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4. One commentator has noted that there is a vested right to public assistance in California. "In respect to State legislation, only California has enacted vested rights concepts into its welfare statute." Graham, *Public Assistance: The Right to Receive, The Obligation to Repay*, 43 NYU L. Rev. 451, 467 (1968).

5. Appellees agree that persons who meet the statutory criteria for public assistance receive aid as a matter of statutory entitlement in California. [A. 55]; see also Brief for Appellees pp. 19-25 in the case of *Goldberg v. Kelly*, No. 62, October Term, 1969.

labelled a 'right,' 'privilege' or 'benefit.' See *Sherbert v. Verner*, 374 U.S. 398, 404 (1962). Its importance is magnified by the defenseless and disadvantaged state of the class of citizens to which it relates, who are usually less able than others to enforce their rights. It can hardly be doubted that the subsistence level of our indigent and unemployable aged, blind and disabled involves a more crucial aspect of life and liberty than the right to operate a business on Sunday or to extract gas from subsoil. We believe that with the stakes so high in terms of human misery the equal protection standard to be applied should be stricter than that used upon review of commercial legislation and more nearly approximate that applied to laws affecting fundamental constitutional rights." *Rothstein v. Wyman*, 69 Civ. 2763 (SDNY, Aug. 4, 1969) at p. 16-17.

II

APPELLEES HAVE FAILED TO DEMONSTRATE ANY VITAL STATE INTEREST WHICH WOULD JUSTIFY A RELAXATION OF THE PROCEDURAL SAFEGUARDS TRADITIONALLY ASSOCIATED WITH ADJUDICATIVE HEARINGS.

Appellees attempt to justify the informal conference before termination of welfare assistance on the grounds of administrative convenience, noting that there are many thousands of recipients of public assistance in California[6]

6. Although appellants technically represent only the class of Old Age Security (hereinafter "OAS") recipients in California, the informal conference regulation at issue applies to all recipients of aid under the federally supported welfare programs. As of June, 1968, there were 1,285,804 recipients of cash grants in California. Of this number, 291,348 were receiving OAS, 12,357 were receiving Aid to the Blind, 147, Aid to the Potential Self-Supporting Blind, 118,318, Aid to the Totally Disabled. The largest number of recipients were in the Aid to Families with Dependent Children (AFDC) program. A total of 785,099 adults and children were receiving aid under this program. Approximately one-half of this cost of the programs was met by federal funds provided under the Social Security Act, California State Department of Social Welfare (hereinafter "SDSW"), Research and Statistics Division, *Public Welfare in California: The Annual Statistical Report 1967-68*, Table 1.

and that many decisions must be made regarding their eligibility. (Appellees' Brief p. 6) Certainly, administration convenience alone could not justify the informal conference. As this court stated in *Ohio Bell Telephone Co. v. Public Utilities Comm.*, 301 U.S. 292, 304-305 (1937):

> "The right to [a fair and open] hearing is one of the rudiments of fair play assured to every litigant by the 14th Amendment as a minimal requirement. *There can be no compromise on footing of convenience or expediency, or because of a natural desire to be rid of harassing delay,* when that minimal requirement has been neglected or ignored." (Emphasis added)

Appellees further assert that "protection of the fisc" has not been abandoned as a reason to justify the informal conference. Nowhere in appellees' brief or in the record before this court is there any support for the proposition that the State of California will be seriously disadvantaged if termination of public assistance is preceded by adequate notice and an opportunity for the type of hearing asserted by appellants to be constitutionally required in the welfare context.

By the State's own figures, the effect on California of having welfare assistance continue until a "fair hearing" decision has been de minimus. In the period September 20, 1968 to August 31, 1969, only 86 recipients had aid continue pending the fair hearing in accordance with the court order in *McCullough v. Terzian* (No. 379011, Cal. Sup. Ct. Alameda Cty., May 12, 1968) at a cost of only $15,217.38. [California SDSW, Research and Statistics Division, *Restoration of Aid Payments Following Filing of Affidavit. Cases and Amounts of Monthly Payment by County* (September 8, 1969).] Since the federal government now provides financial reimbursement in the form of matching funds for continuation of public assistance pending the fair hearing, the

direct cost to the State is even less. [H.E.W., Federal Handbook, Pt IV, Section 6500(b) (set forth in full in Appellants' Brief, App. 12a)].

Moreover, as appellees acknowledge the State can obtain restitution for any funds improperly paid out. Appellees' Brief p. 12; Cal. Welf. & Inst. C. §§ 12203, 12205. In addition, the State has sufficient protections in the form of criminal penalties for any fraudulent receipt of public assistance. See e.g. Cal. Welf. & Inst. C. § 12251.[7]

III

THE INFORMAL CONFERENCE PROVIDED BEFORE TERMINATION IS NOT A HEARING, BUT AN ADJUSTMENT PROCEDURE FOR THE POSSIBLE RESOLUTION OF CLAIMS.

The informal conference lacks almost all of the elements traditionally associated with adjudicative hearings and makes a mockery of appellees' tactical concession that some hearing is required before welfare assistance is terminated or suspended.

Appellees' brief confirms what appellants have already made clear to this court—that welfare recipients are subject to an elaborate scheme of investigation and reinvestigation to determine eligibility. Once found eligible, however, a recipient should be entitled to an adequate opportunity to demonstrate that the county welfare department's initial determination of ineligibility is in error.[8]

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7. Despite the inadequacy of welfare grants and the intolerable conditions in which welfare recipients find themselves, recent studies in California have indicated that the extent of welfare fraud is less than 1%. A report of the fifteen month survey of welfare fraud conducted by the California SDSW release in December, 1965, found that established fraud amounted to a "fraction of 1/30 of 1% of the total AFDC caseload." Calif. SDSW, *News Release,* December 10, 1965.

8. Appellees attempt to bolster their inadequate notice provisions by asserting the notice form (*i.e.*, "You are no longer dis-

An opportunity to confer with the very person who led the investigation and who, under the regulations cited by appellees, has already met with the recipient, cannot provide a forum for the adjudication of serious disputes between the recipient and the county. A county determination of ineligibility is to be made even when evidence is conflicting or inconsistent when the county concludes *in its view* that the preponderance of the evidence supports the decision to terminate. PSS Reg. 40-155.15 (set forth in full in Appellees' Brief, App. II, p. 11.)

As a final filter to clear up obvious misunderstandings or to explain the reasons in detail for the decision to terminate, the conference might serve some function. However, it is a function clearly distinct from that traditionally served by an adjudicative hearing.

Surely, a recipient, at the critical point in time when the continued receipt of her grant is in jeopardy, is entitled to more than a procedure which permits three days for preparation, no cross-examination, no disinterested arbiter, no record, and possibly no decision at all.[9] In defense of the notice requirement appellees contend that the recipient's case record is always available for inspection; hence, greater notice is unnecessary. (Appellants' Brief, pp. 9-10.) To this contention there are two replies. First, what need is there for a recipient—even one under investigation—to retain a lawyer or representative to review her file before she is advised that her grant will be terminated?

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abled") must be accompanied by a letter of explanation. However, the sending of such a letter is *not required* by State regulation, but merely deemed advisable. SDSW, Operations Manual, 22-203.4, set out in full in Appellees' Brief, App. III, p. 22. As with most recommendations, until made mandatory it will be and has been disregarded.

9. PSS Reg. 44-325.434(c) requires that at the informal conference the matter be discussed informally "for purposes of clarification and, *where possible, resolution.*" (Emphasis added)

Certainly, if she believes she is eligible, she would assume that a decision to terminate would not be made. Welfare recipients engaged in a daily battle to survive on inadequate grants will not, and certainly cannot move to defend themselves before they are notified that a defense is necessary. Second, the entire case record is not available to a recipient. Significantly, the identity of informers is withheld from the recipient. PSS Reg. 48-013.1 (set out in full in Appellees' Brief, App. III, p. 20).

As a final justification for the informal conference, appellees catalog a variety of post-conference procedures which appellees ironically assert afford recipients additional due process (Appellees' Brief, pp. 16-18.) However, a recipient's aid does not continue while these procedures are being explored or while the recipient waits for a fair hearing decision. Hence, in terms of the type of hearing appellants assert is necessary *prior* to termination, these remedies are of little consolation.

Dated: October 7, 1969.

Respectfully submitted,

PETER E. SITKIN
STEVEN J. ANTLER
SIDNEY M. WOLINSKY
CHARLES STEPHEN RALSTON
Attorneys for Appellants

EDWARD V. SPARER
MICHAEL S. ZOLA
WINTON D. WOODS, JR.
Of Counsel

Appendix 1a

State of California
Department of Social Welfare

Research and Statistics
June 5, 1967

AID TO FAMILIES WITH DEPENDENT CHILDREN
Family Group Cases
July 1966

Table Types of Personal Property Owned

	Type of Property	Families — Number	Families — Percent	
	Total	142,044	100.0	
	Owns no personal property	94,885	66.8	
	Owns personal property	47,159	33.2	100.0[1]
23%	Automobile	33,011		70.0
8%	Life insurance	12,167		25.8
	Cash and securities	11,648		24.7
	Other personal property	990		2.1

[1]Categories do not add to 100 percent because some families own more than one type of personal property.

Two-thirds of the AFDC families owned no personal property. Of those which did, seven out of ten owned an automobile.

Appendix 2a

State of California
Department of Social Welfare

Research and Statistics
May 29, 1967

AID TO FAMILIES WITH DEPENDENT CHILDREN
Family Group Cases
July 1966

Table Value of Personal Property Owned

	Families		
	Number	Percent	
Total	142,044	100.0	
Does not own personal property	95,027	66.9	
Owns personal property	47,017	33.1	100.0
Less than $50	7,288		15.5
$50 - 99	5,783		12.3
100 - 149	11,847		25.2
150 - 199	6,770		14.4
200 - 299	7,006		14.9
300 - 399	4,185		8.9
400 - 499	2,351		5.0
500 - 599	1,787		3.8
Average value of property, for families with personal property	$163.55		

One in three AFDC families has personal property.
Of those that do, two-thirds have property valued at less than $200.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 14.—OCTOBER TERM, 1969

Mae Wheeler et al., Appellants, *v.* John Montgomery, Director of the State Department of Social Welfare, et al.	On Appeal From the United States District Court for the Northern District of California.

[March 23, 1970]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This is a companion case to No. 62—*Goldberg* v. *Kelly, ante.* It is a class action brought by all recipients of old age benefits who are subject to California welfare termination provisions. A three-judge District Court for the Northern District of California held that the California procedure for pre-termination review in welfare cases satisfies the requirements of the Due Process Clause, 296 F. Supp. 138 (1968), and we noted probable jurisdiction, 394 U. S. 970 (1969). This procedure requires notice to the recipient of the proposed discontinuance or suspension at least three days prior to its effective date, together with reasons for the intended action and a statement of what information or action is required to re-establish eligibility, advice that the recipient may meet his caseworker before his benefits are terminated "[t]o discuss the entire matter informally for purposes of clarification and, where possible, resolution," and assurance that there will be "prompt investigation" of the case and restoration of payments "as soon as there is eligibility" to receive them.* The procedure does not, how-

*California State Department of Social Welfare, Public Social Services Manual, Reg. 44-325 (effective April 1, 1968). The pertinent provisions of the regulation state:

"The recipient . . . shall be notified, in writing, immediately

ever, afford the recipient an evidentiary hearing at which he may personally appear to offer oral evidence and confront and cross-examine the witnesses against him. In *Goldberg* v. *Kelly, ante,* decided today, we held that procedural due process requires such an evidentiary pretermination hearing before welfare payments may be discontinued or suspended. Accordingly, the judgment of the District Court must be and is reversed on the authority of *Goldberg* v. *Kelly.*

Reversed.

MR. JUSTICE BLACK, for the reasons set forth in his dissenting opinion in No. 62, *Goldberg* v. *Kelly, ante,* p. ——, dissents and would affirm the judgment below.

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upon the initial decision being made to withhold a warrant beyond its usual delivery date . . . and in no case less than three . . . mail delivery days prior to the usual delivery date of the warrant . . . . The county shall give such notice as it has reason to believe will be effective including, if necessary, a home call by appropriate personnel. . . . Every notification shall include:

".431 A statement setting forth the proposed action and the grounds therefor, together with what information, if any, is needed or action required to reestablish eligibility . . . .

".432 Assurance that prompt investigation is being made; that the withheld warrant will be delivered as soon as there is eligibility to receive it; and that the evidence or other information which brought about the withholding action will be freely discussed with the recipient . . . if he so desires . . . .

. . . . . .

".434 A statement that the recipient . . . may have the opportunity to meet with his caseworker . . . in the county department, at a specified time, or during a given time period which shall not exceed three . . . working days, and the last day of which shall be at least one . . . day prior to the usual delivery date of the warrant, and at a place specifically designated in order to enable the recipient . . .

"(a) To learn the nature and extent of the information on which the withholding action is based;

"(b) To provide any explanation or information, including, but not limited to that described in the notification . . . ;

"(c) To discuss the entire matter informally for purposes of clarification and, where possible, resolution."

SUPREME COURT OF THE UNITED STATES

Nos. 14 AND 62.—OCTOBER TERM, 1969

Mae Wheeler et al., Appellants, 14 *v.* John Montgomery, Director of the State Department of Social Welfare, et al.	On Appeal from the United States District Court for the Northern District of California.
Jack R. Goldberg, Commissioner of Social Services of the City of New York, Appellant, 62 *v.* John Kelly et al.	On Appeal from the United States District Court for the Southern District of New York.

[March 23, 1970]

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE BLACK joins, dissenting.

Although I agree in large part with MR. JUSTICE BLACK's views in No. 62, *Goldberg* v. *Kelly, ante,* p. —, there are additional factors I wish to mention in dissent from today's unwise and precipitous constitutional holding.

The procedures for review of administrative action in the "welfare" area are in a relatively early stage of development; HEW has already taken the initiative by promulgating regulations requiring that AFDC payments be continued until a final decision after a "fair hearing" is held.[1] The net effect would be to provide a hearing prior to a termination of benefits. Indeed, the HEW administrative regulations go far beyond the result reached today since they require recipients be given the right to appointed counsel,[2] a position expressly rejected by the majority. As the majority notes, see

[1] 45 CFR 205.10, 34 Fed. Reg. 1144 (1969).

[2] 45 CFR 220.25, 34 Fed. Reg. 1356 (1969). See also HEW Handbook, Pt. IV, §§ 2300 (d)(5), 6200–6400.

ante n. 3, these regulations are scheduled to take effect in July 1970. Against this background I am baffled as to why we should engage in "legislating" via constitutional fiat when an apparently reasonable result has been accomplished administratively.

That HEW has already passed such regulations suggests to me that we ought to hold the heavy hand of constitutional adjudication and allow evolutionary processes at various administrative levels to experiment, given their flexibility to make adjustments in procedure without long delays. This would permit orderly development of procedural solutions, aided as they would be by expert guidance available within federal agencies which have an overview of the entire problem in 50 States. I cannot accept—indeed I reject—any notion that a government which pays out billions of dollars to nearly 12 million welfare recipients is heartless, insensitive or indifferent to the legitimate needs of the poor.

The Court's action today seems another manifestation of the now familiar constitutionalizing syndrome: once some presumed flaw is observed, the Court then eagerly accepts the invitation to find a constitutionally "rooted" remedy. If no provision is explicit on the point, it is then seen as "implicit" or commanded by the vague and nebulous concept of "fairness."

I can share the impatience of all who seek instant solutions; there is a great temptation in this area to frame remedies which seem fair and can be mandated forthwith as against administrative or congressional action which calls for careful and extended study. That is thought too slow. But however cumbersome or glacial, this is the procedure the Constitution contemplated.

I would not suggest that the procedures of administering the Nation's complex welfare programs are beyond the reach of courts, but I would wait until more is known

about the problems before fashioning solutions in the rigidity of a constitutional holding.

By allowing the administrators to deal with these problems we leave room for adjustments if, for example, it is found that a particular hearing process is too costly; the history of the complexity of the administrative process followed by judicial review as we have seen it for the past 30 years should suggest the possibility that new layers of procedural protection may become an intolerable drain on the very funds earmarked for food, clothing, and other living essentials.[3]

Aside from the administrative morass which today's decision could well create, the Court should also be cognizant of the legal precedent it may be setting. The majority holding raises intriguing possibilities concerning the right to a hearing at other stages in the welfare process which affect the total sum of assistance, even though the action taken might fall short of complete termination. For example, does the Court's holding embrace welfare reductions or denial of increases as opposed to terminations, or decision concerning initial applications or requests for special assistance. The Court supplies no distinguishable considerations and leaves these crucial questions unanswered.

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[3] We are told, for example, that Los Angeles County alone employs 12,500 welfare workers to process grants to 500,000 people under various welfare programs. The record does not reveal how many more employees will be required to give this newly discovered "due process" to every welfare recipient whose payments are terminated for fraud or other factors of ineligibility or those whose initial applications are denied.

SUPREME COURT OF THE UNITED STATES

Nos. 14 AND 62.—OCTOBER TERM, 1969

Mae Wheeler et al., Appellants, 14 *v.* John Montgomery, Director of the State Department of Social Welfare, et al.	On Appeal from the United States District Court for the Northern District of California.
Jack R. Goldberg, Commissioner of Social Services of the City of New York, Appellant, 62 *v.* John Kelly et al.	On Appeal from the United States District Court for the Southern District of New York.

[March 23, 1970]

MR. JUSTICE STEWART, dissenting.

Although the question is for me a close one, I do not believe that the procedures that New York and California now follow in terminating welfare payments are violative of the United States Constitution. See *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U. S. 886, 894–897.